

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CONRAD M. BLACK,
PETER Y. ATKINSON,
JOHN A. BOULTBEE, and
MARK S. KIPNIS

Defendants-Appellants

Appeal from the District Court
for the Northern District of Illinois,
Eastern Division

No. 05-CR-727

Judge Amy J. St Eve

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PRELIMINARY STATEMENT

This extraordinary case began as a shareholder dispute about appropriate corporate governance. In the late 1990s, as the rise of the internet threatened the viability of print newspaper, defendant Conrad Black, Chairman and CEO of Hollinger International ("International"), initiated, with Board approval, a plan to divest International of most of its community newspaper properties through sales to various purchasers. Although the strategy ultimately increased shareholder value by hundreds of millions of dollars, one feature in particular was the subject of intense criticism: Most of these sales included non-compete agreements that involved payments to International's controlling shareholder, Hollinger, Inc. ("Inc."), and occasionally to Black, defendants John Boulton and Peter Atkinson (who were officers of International and Inc.), and David Radler, Black's long-time business partner (and government cooperator). In return, Radler, Black, Boulton, and Atkinson agreed not to compete with the purchasers of the newspaper properties. Defendant Mark Kipnis (International's Corporate Counsel, Secretary and Vice President of Law) was involved in preparing the legal documentation for the transactions.

Although non-compete agreements like these are routine in the newspaper industry, their lawfulness or propriety was questioned by shareholders and ultimately a Special Committee of the Board. To the government, however, these non-competes constituted mail and honest services fraud.

The trial in this case resembled civil litigation more than a criminal trial, with the jury forced to consider and determine complicated and nuanced issues of GAAP,

GAAS, Delaware business corporation law, federal securities law, the negotiation and documentation of complex commercial transactions, executive compensation, and U.S. and Canadian tax law. These are matters generally decided by a knowledgeable and specialized judge of the Delaware Chancery Court, not by a lay jury.

Here, the government's principal theory was that the purchasers of the newspaper properties never asked for the non-compete agreements in the first place, and did not truly care if they received them, and that the compensation was not adequately disclosed to International's Audit Committee. In the government's view, the agreements – and the payments received pursuant to them – therefore deprived International of its money or property and right to defendants' "honest services," within the meaning of 18 U.S.C. §§1341 and 1346. That theory underlay the large majority of the charges in the case, and consumed the vast bulk of the evidence and argument at trial. But the jury acquitted on each count that reflected the government's theory.

Four counts of conviction are now left for this appeal, each vainly searching for a theory of criminality. The government's principal witness exculpated defendants on two of the counts (Counts 1 & 6, the so-called APC counts), and there was simply no evidence of any sort to support the conviction on the third (Count 7, the so-called Supplemental Payments). Count 13 – charging Black alone with obstruction of justice – was based on Black's act of removing from his longtime office boxes containing his personal papers and effects, on the eve of his eviction from the space by new

management, and in full view of others, including his assistant and security cameras. There was no evidence whatsoever of any intent to obstruct justice.

To make matters worse, the trial court permitted the prosecution to take two crucial evidentiary shortcuts during the trial. Lacking proof of the defendants' actual knowledge of the key facts on Counts 1, 6, and 7, the government sought and obtained an unwarranted "ostrich" instruction. Lacking proof of the defendants' participation in any actual scheme to defraud, the government invited the jury to convict based on uncharged, inaccurate SEC disclosures filed long after the fact — and the district court refused to instruct the jury on the limited relevance of this evidence.

For all of these reasons, as we show below, the judgments of conviction for all defendants should be reversed and the charges dismissed or retried under correct principles of law.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction because defendants were charged with federal crimes. 18 U.S.C. § 3231. This Court has appellate jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742. Judgment against Black was entered on December 20, 2007 (A1), and he appealed on December 27, 2007 (R. 985). Judgment was entered against Atkinson on December 27, 2007 (A46), and he appealed on January 4, 2008 (R. 994). Judgment was entered against Boulton on December 27, 2007 (A73), and

he appealed on January 4, 2008 (R. 992). Judgment was entered against Kipnis on December 28, 2007 (A105), and he appealed on January 11, 2008 (R. 1006).¹

ISSUES PRESENTED

1. With respect to the APC payments (Counts 1 and 6):
 - a. Whether the evidence was sufficient to establish that defendants knowingly misappropriated International's money.
 - b. Whether, if no knowing misappropriation was proven, the government nevertheless proved a deprivation of International's intangible right to defendants' honest services.
 - c. Whether the court erred by failing to instruct the jury that an honest-services conviction required a finding that defendants gained at the expense of the charged victim.
2. With respect to the Supplemental Payments (Count 7):
 - a. Whether there was sufficient evidence that any defendant knew that his payment derived from misappropriated funds.
 - b. Whether the government proved the charged mailing.
3. Whether it was reversible error to give a conscious avoidance instruction.
4. Whether it was reversible error to refuse to instruct the jury that it could not base mail fraud convictions on alleged misrepresentations made a year or more after the end of the charged scheme.
5. With respect to Black's conviction for obstruction of justice (Count 13):
 - a. Whether the government adduced sufficient evidence that Black acted with obstructive intent in removing boxes of documents from offices from which he was being evicted.

¹ This brief uses the following references: trial transcript, "T. [page#]"; appellants' required short appendix, "A [page#]"; separate appendix, "SA [page#]"; documents listed in the record on appeal index, "R. [#]"; government and defense trial exhibits, "GX [# or name]" and "DX [# or name]," respectively; and the government's 02/25/08 bail response in this Court, "GR [page#]."

- b. Whether the government was allowed to make prejudicial misuse of a claim that Black's removal of the boxes violated a Canadian court order.

STATEMENT OF THE CASE

Defendants were tried on a seventeen-count Superseding Information returned in January 2007. Defendants' four-month jury trial before Judge Amy J. St. Eve commenced in mid-March 2007 and concluded in mid-July, when, after 11 days of deliberations, the jury returned verdicts acquitting defendants on all counts but the APC and Supplemental Payments charged as mail fraud (Counts 1, 6, and 7) and, as to Black only, obstruction of justice (Count 13).

On November 5, 2007, the district court acquitted Kipnis on Count 7 but otherwise denied defendants' motions for acquittals or a new trial. R. 928; SA183.

On December 10, 2007, the district court sentenced defendants, except Kipnis, to, *inter alia*, the following terms of imprisonment: Black, 78 months; Atkinson, 24 months; and Boulton, 27 months. A7, A46, A84. Kipnis received probation, with six months home detention. A115. All four defendants were released on bail during the trial. This Court continued Atkinson and Boulton on release pending appeal, while Black is currently confined pursuant to the judgment being appealed.

STATEMENT OF FACTS

Background

Conrad Black and David Radler, business partners of more than 30 years, built Hollinger International, Inc. ("International" or "the Company"), a U.S. public company, into a global publishing empire, which eventually owned, through

subsidiaries, hundreds of newspapers around the world, including *The Chicago Sun-Times*, the *Jerusalem Post*, the *National Post* in Canada, and the *Daily Telegraph* in the United Kingdom. GX Filing 9-A; T.7473-7474, 7532-34. Black, who worked much of the time from London, was Chairman and CEO of International. T.7449, 8163. Radler, who worked principally from International's Chicago offices and had primary responsibility for the operation of the Company's U.S. newspapers, served as International's President and COO. T.7720; GX Filing 9-A. John A. Boulton, a Canadian chartered accountant, was International's Executive Vice President (and its CFO until 1999). T.4574; GX Filing 9-A at Disclosure 28. Peter Atkinson, a Canadian attorney, was Vice President of International and General Counsel Inc., a Canadian public company that, through "super-voting" shares, was International's controlling shareholder. T.6433; GX Filing 9A. Boulton and Atkinson worked from Toronto. Mark Kipnis, a Chicago lawyer, was International's Corporate Counsel and Secretary. GX Filing 9A.

Executive management of International and its subsidiaries was provided by Ravelston Corp. Ltd. ("Ravelston"), a private Canadian company that owned a controlling interest in Inc. Black and Radler owned, respectively, 65% and 14% of Ravelston, while Atkinson and Boulton each owned less than 1%. GX Summary 2. (We refer to Radler, Black, Atkinson, and Boulton collectively as the Ravelston Executives.) Kipnis had no ownership interest in or involvement with Ravelston. Although Black and Radler were directors and, together with Atkinson and Boulton, officers of International, Ravelston paid almost all of their compensation. Through Ravelston, they provided services to International under management services

agreements annually submitted to and approved by International's Audit Committee and Board. SA386-87; T.5987-88; GX Filing 9-E(1). The Audit Committee members were former Illinois Governor James R. Thompson, Marie-Josée Kravis (a director of Ford Motor Company and several other major U.S. public companies), and Richard Burt (a former Assistant Secretary of State and Ambassador to Germany). GX Filing 9-E(1).

In the late 1990s, Black foresaw the internet causing a downturn in the print newspaper industry. SA589; T.1639-40. With Board approval, International initiated a plan to improve profitability and reduce debt by selling most of its community newspaper properties. The plan worked. Willing buyers snapped up the assets and International shareholder value increased by hundreds of millions of dollars. SA589, 563; GX Filing 9-C. As part of these sales, International, often Inc., and sometimes the Ravelston Executives, entered into non-compete agreements with the new owners of the newspapers the Company sold. SA571. Non-compete agreements are routine in the industry; they prevent sellers from using knowledge of their former businesses to set up shop across the street. T.1497, 2443. The covenantors agree not to compete and receive part of the sale proceeds as consideration. T.2443.

In the Fall of 2005, defendants were indicted in the Northern District of Illinois for their alleged participation in a scheme (1) to defraud International of (a) the amount of certain non-compete payments to the Ravelston Executives and Inc., and (b) its intangible right to defendants' honest services, and (2) to defraud Canada of taxes assertedly due for sums received pursuant to supposedly sham non-compete agreements. SA56a. Following several superseding indictments and a guilty plea by

co-defendant Radler, defendants were named in a Superseding Information (“the Information”) filed on January 10, 2007, charging them with mail fraud, wire fraud, and tax fraud related to their role in various non-compete agreements that provided for payments to Inc. and personal payments to the Ravelston Executives. The Information also charged Black with engaging in a forbidden monetary transaction (18 U.S.C. § 1957), obstruction of justice, and RICO violations. In addition, Black and Boulton were charged with three counts of wire fraud against International (the “perks counts”) in connection with certain perquisites paid by the Company on Black’s behalf.

The government abandoned the “fraud on Canada” theory before trial, withdrawing Canada as a charged victim. With Canada supposedly out of the picture, the government’s principal theory of wrongdoing was that defendants committed mail and wire fraud by inserting the Ravelston Executives, and sometimes Inc., as covenantors in non-compete agreements when the newspaper purchasers neither requested such covenants nor cared whether they were obtained. The government contended that by doing so the Ravelston Executives were able wrongfully to divert to themselves or Inc. part of the sale proceeds that would have otherwise gone to International. Kipnis (who received no non-compete payments himself) allegedly facilitated the scheme. Inc. allegedly wrongfully received non-compete payments in connection with newspaper sales to Forum Communications (“Forum”), Paxton Media Group (“Paxton”), Horizon Publications (“Horizon”), Community Newspaper Holdings (“CNHI”), and Intertec Publishing. The Ravelston Executives allegedly wrongfully inserted themselves as non-compete covenantors in the sales of newspapers

to CanWest Global Communications (“CanWest”) and in a second sale of newspapers to CNHI (“CNHI II”). These supposedly wrongful payments were charged as fraud in Counts 2-5, 8, and 9. R. 1, 17, 21, 47, 97, 219; SA57.²

The jury acquitted all defendants of the mail, wire, and tax frauds charged in Counts 2-5, 8-9, and 15-16, rejecting the government’s principal theory of defendants’ culpability. It also acquitted on the RICO and “perks” counts. The §1957 count against Black was withdrawn before the case went to the jury.

This left Counts 1, 6, and 7, which reflected a different theory. In contrast to Counts 2-5, 8, and 9 (charging mail or wire fraud for transactions in which the Ravelston Executives or Inc. received consideration for non-compete agreements that were actually executed as part of newspaper sales), these counts involved payments that were either (1) made pursuant to non-compete agreements not associated with any newspaper sale (the so-called American Publishing Company (“APC”) payments charged in Counts 1 and 6) or (2) made from the proceeds of a sale in which non-compete agreements were intended but never executed (the so-called “Supplemental Payments” charged in Count 7). The jury convicted only on Counts 1, 6, and 7. Black was separately convicted of obstruction (Count 13).

The important distinction between the counts of acquittal and the counts of conviction was not lost on the district court. In requesting forfeiture based on the

² The Board approved in the same period other similar transactions in which the Ravelston Executives signed individual non-compete agreements for which they received compensation, but as to which defendants were not charged, *e.g.*, International’s sale of Canadian media properties to Osprey (a Canadian company). T.3328-30, 6492-93.

acquitted conduct, the government contended that it had proven one overarching scheme. The district court disagreed:

Having weighed the evidence presented at trial and the credibility of the witnesses *** the Court finds that the government has not established by a preponderance of the evidence that the non-competition payments related to CNHI(II), Forum, and Paxton [Counts 2-5] constitute a part of an overarching scheme to defraud. There are material distinctions between CNHI(II), Forum, and Paxton, on the one hand, and the counts of conviction – the APC transaction and the Supplemental Payments [Counts 1, 6, and 7] – on the other.³

R.972 at 19-20.

The APC Payments (Counts 1 and 6)

APC was the operating arm of International's U.S. community newspapers group and one of several dozen International subsidiaries. T.6759-60, 8538. The subsidiaries were responsible for paying a portion of the annual management fees that International owed to Ravelston for providing executive, management, and administrative services to International and its subsidiaries. SA386-87. Radler negotiated the management fees each year with International's Audit Committee, and the Committee approved fees of between \$32 million and \$37.5 million for the years 1998 to 2000. SA386-87; T.7061-7069, 13675, 15089, 15134-35.

³ The court's forfeiture decision discussed only the CNHI II, Forum, and Paxton transactions (and the APC and Supplemental Payments) because the earlier transactions were not subject to forfeiture under the statutes then in effect. Nevertheless, the court's finding on the later payments applies equally to the earlier ones, a point the court made clear at sentencing. See A15 ("the government is asking to apply a \$32.15 million loss figure, accounting for all of the conduct charged in the case *** The Court disagrees").

In early 2001, Radler believed that APC still owed Ravelston \$5.5 million in approved but unpaid management fees for 2000. SA392-94. Radler had learned several months earlier (in connection with the sale of newspapers to CanWest that underlay acquitted Counts 8-9) that Canadian taxpayers could avoid substantial taxes if payments could be structured as non-compete consideration, and he told Boulton and Atkinson about the tax benefit. SA138; T. 8947-51.

Uncontradicted evidence showed that Radler was right: legal developments in Canada in 2000 and 2001 meant that non-compete payments to individuals were not taxable income and did not have to be reported. SA462-71. Further, under Canadian law, payments could be recharacterized as non-compete consideration and still receive tax-free treatment without regard to the transaction's substance, so long as the parties had in fact executed enforceable non-compete agreements. SA469-73. As a result, a new concept of tax structuring evolved in commercial transactions during the relevant period – minimizing Canadians' tax liability by allocating a portion of the sales price to individuals and characterizing the payments as non-compete consideration. SA473, 475-76.

Radler saw an opportunity and seized it. To take advantage of the favorable tax treatment, Radler caused an APC executive, Roland McBride, to distribute the \$5.5 million owed in management fees directly to the Ravelston Executives as non-compete payments. SA393-94; T.8944-47. Radler was the government's principal trial witness,

particularly concerning the APC payments.⁴ He testified unequivocally that he believed that those payments were legitimate management fees due and owing to Ravelston. That belief in turn explained why he saw no need to seek further Audit Committee approval for the APC non-compete payments:

Prosecutor: Did you advise the Audit Committee or the Board of Directors for Hollinger International that you *** and other executives had received \$5.5 million payment for agreeing not to compete with an International subsidiary?

Radler: No, I didn't.

Prosecutor: Why not?

Radler: Well, at the time of the *** issuance of these checks, I was not aware that I was actually issuing money that belonged to Hollinger International, as opposed to money that belonged to Ravelston.

SA382-83. On cross-examination, Radler confirmed his understanding that the APC payments were previously approved management fees structured in a tax-advantageous manner:

Q: [The government] did not ask you [on direct] why you believed that the money paid out of the APC belonged to Ravelston, but I'd like to explore that with you for a moment. You believed, did you not, that the APC payments were money that belonged to Ravelston because you understood that the APC payments represented a payment of management fees that had already been approved by the Audit Committee, correct?

A: Yes.

⁴ Radler testified pursuant to a plea agreement that promised him a prison term of no more than 29 months. The government also agreed to take no position on Radler's request for a treaty transfer to Canada, where he can serve as little as six months. T. 8470, 9282.

Q: And you understood that the Non-Compete Agreements were signed in connection with these payments in the hope that the recipients would minimize the taxes they'd have to pay, correct?

A: Yes.

SA385-86.

Q: And the [management] fee for 2000 had been approved by International's Audit Committee ***

A: Yes.

Q: So, on February, 2001, you instructed Roland McBride to make four payments totaling \$5.5 million to you, Mr. Black, Mr. Boulton, Mr. Atkinson effective year-end 2000, correct?

A: Correct. Correct.

Q: Each of the recipients of these payments – you, Conrad Black, Jack Boulton and Peter Atkinson – were then employed by Ravelston, correct?

A: Yes.

Q: Now, by signing the APC Non-Competition Agreement, there was a good chance – or at least a reasonable prospect – that the payment would be free of taxes in Canada, correct?

A: Yes.

Q: And when you gave the instruction that you gave *** you understood – that the payment was part of unpaid, but approved management fees owed to Ravelston, correct?

A: Yes.

SA393-94.

Consistent with his understanding, Radler directed Kipnis to draft non-compete agreements in which the Ravelston Executives agreed not to compete with APC. To give the agreements even more substance to the benefit of the Company, Kipnis included provisions also preventing competition with APC's affiliates, which included International, and he made the agreements effective for three years after "termination of [the executives'] employment." SA375, 535; GX APC 8, 11, 15. Kipnis sent the unexecuted non-compete agreements and the executives' respective checks, drawn on the account of an APC subsidiary (APMS), to Atkinson for distribution to himself, Black, and Boulton. Atkinson later returned the executed agreements to Kipnis for International's files. SA533-34, 239. Kipnis's and Atkinson's transmittal letters, the non-compete agreements, and copies of the checks were all kept in International's files. T.2980-81.

Following Radler's directive, McBride sent International's controller, Fred Creasey, a memorandum in February 2001 directing Creasey to account for the APC payments as "effective 12/31/2000," the year for which Radler believed the management fees were owed, and to reflect them "on the 2000 year-end closing package." SA532. Creasey was the only other government witness to testify about the APC payments. He denied having any knowledge of the APC payments or any recollection concerning how he accounted for them at the time, but he did not deny receiving the February 2001 McBride memorandum. SA243, 245-48.

Of the \$5.5 million in APC personal non-compete payments, Black and Radler received \$2,612,500 each; Atkinson and Boulton received \$137,500 each. GX APC 4.

The Supplemental Payments (Count 7)

In the Fall of 2000, International sold additional U.S. newspapers to Paxton and Forum in transactions largely negotiated by Radler. GX Paxton 2; GX Forum 6; T.2441-42. These transactions had been approved by International's Executive Committee, consisting of Radler, Black, and Richard Perle (an International Board member and former Assistant Secretary of Defense); the Executive Committee Consents approved inclusion of non-compete agreements with Paxton and Forum by International and "certain executive officers of International." SA557, 559. (Radler testified that he and Black had discussed the inclusion of such "personal non-competes" in these deals during an August 2000 telephone conversation.) In December 2000, International's Board unanimously approved the Executive Committee Consents. SA540.

Although these Consents and the Board's approval envisioned that "certain executives" would enter into non-compete agreements, Kipnis, unbeknownst to the Ravelston Executives, forgot to include the individual non-compete covenants in the transaction documents or to set aside money for that purpose. SA366-68, 370-71.

Radler testified that, in early 2001, Black called him to ask about his non-compete payment in the Forum and Paxton transactions. SA361-62. At the time, Radler believed that approximately \$2 million had been set aside for individual non-compete payments for Forum and Paxton. SA362-63. Radler told Black that he would look into the matter and report back. SA361-62.

Radler then learned from Kipnis that no money had been allocated from the sales proceeds for individual non-compete payments, an omission that Kipnis attributed to

his being very busy at the time. SA362-63, 367. Upon learning that \$600,000 still remained in the reserve accounts for the Forum and Paxton transactions, Radler decided to allocate those funds as non-compete payments, and he directed McBride to do so by sending the payments to Kipnis for distribution to the Ravelston Executives. SA363, 368-69. Radler testified that, upon learning of the \$600,000 in the Forum and Paxton reserve funds, he called Black and informed him that \$600,000 "could be allocated" for individual non-competes payments, and Black agreed with the proposed allocation among the Ravelston Executives. SA368-69.

McBride prepared a memorandum (dated April 6, 2001 and reflecting that Radler and Kipnis were to receive copies) directing a subordinate to issue the checks in the amounts specified by Radler and to send the checks to Kipnis for distribution to the other executives. SA369-70; SA572.

The government never claimed, and there was no evidence, that Black, Boulton, or Atkinson ever saw the April 2001 memorandum. SA572. Moreover, the district court acquitted Kipnis on Count 7 based in part on its finding that there was insufficient evidence proving that Kipnis received the April 2001 memorandum or knew its contents. SA204. Radler himself did not recollect ever seeing the April 2001 memorandum. SA396-97.

Count 7 charged defendants with mail fraud based on an alleged mailing of checks from McBride's office in Marion, Illinois, to Kipnis in Chicago. There was no testimony concerning how the Supplemental Payments found their way to the Ravelston Executives, but the checks to Radler (\$285,000), Black (\$285,000), Atkinson

(\$15,000), and Boulton (\$15,000) were deposited in their respective Canadian banks as early as April 11, 2001. Black's and Atkinson's checks were accompanied by stubs bearing the legend "non-compete pymt." SA574, 79. The government introduced no such check stub for Boulton's check (SA578), nor any other evidence proving that Boulton knew the purpose of his \$15,000 check.

According to Radler, neither Atkinson nor Boulton was a party to any conversation about the Supplemental Payments. SA360-63, SA367-68. Radler's communications with Black were no more than what is described above.

Radler testified that in the Fall of 2003, after a Special Committee of International's Board began looking into the non-compete payments, Radler learned from Kipnis, for the first time, that Kipnis had neglected to draft individual non-compete agreements in the Forum and Paxton transactions. SA370-71. Previously, Radler had been made aware only that Kipnis had failed to set aside money to pay for individual non-compete agreements in those transactions. SA367-68.

Disclosures, Shareholder Discontent, and the Special Committee

International's public disclosures of the non-compete payments to individual executives, made in 2002 and 2003, contributed to shareholder discontent and led to questions about the reasons for the payments. This shareholder discontent ultimately led (1) to International creating a Special Committee to investigate the non-compete payments and related issues; (2) to the initiation of multi-jurisdiction litigation in the U.S. and Canada, including by shareholders and the SEC; and (3) to the government's investigation and the indictment in this case.

Obstruction (Count 13)

In November 2003, the SEC began an investigation focusing on International. As part of that investigation, the SEC served Black with five civil subpoenas over the next eight months. SA150; T.12943-12945. The first subpoena, dated November 18, 2003, called broadly for “[a]ny and all documents relating to the payment of fees, including management and noncompete fees, from Hollinger to or for the benefit of any personnel of Hollinger or its affiliates, including, but not limited to, Conrad Black. . . .” SA150.

It is undisputed that Black fully complied with every SEC demand. He gave his attorneys free and uninhibited access to examine and copy documents in his office, safes, vaults, and homes. SA485-96. The lawyers were sometimes on site for weeks at a time, and his assistant recalled that they seemingly copied virtually every piece of paper in the office. SA434, 486. Through his lawyers, Black produced more than 112,000 pages to the SEC. T. 11370. On November 15, 2004, the SEC filed a civil action against Inc., Radler, and Black. SA151.

Black and his family had occupied offices at 10 Toronto Street in Toronto, Canada, for decades, but by 2004 the offices belonged to Inc. and were used not only by Black personally but also for Inc.’s business. On April 13, 2005, Inc.’s new board of directors ordered Black to vacate 10 Toronto by May 31, 2005. SA145.

In connection with separate legal proceedings in Canada, a Canadian court had appointed an Inspector over Inc., and had entered an order on December 17, 2004, prohibiting removal, alteration, or destruction of documents then currently “resident” at 10 Toronto without the Inspector’s written consent or a court order. SA581. The

order was not directed at any particular individual. *Id.* Pursuant to the order, a document retention policy was being developed at 10 Toronto (SA 588) but Black's assistant, Joan Maida, never discussed the policy with him (SA443-45) and there is no evidence he saw any memos about it.

On March 29, 2005, as part of its civil action, the SEC served a document request on Inc., asking for "[a]ll documents relating to any matters that are the subject of the allegations contained in the [SEC's] Complaint." SA152 (first alteration in original). As a co-defendant, Black was served a copy of this request as well. *Id.* As the government has stipulated, Inc. fully complied with the request and provided documents to the SEC. *Id.*

Late in the afternoon on Thursday, May 19, 2005, an SEC attorney called one of Black's attorneys in Washington, D.C., to tell her that the SEC would "shortly" be making a another document request of Black. SA420, 422. The SEC attorney followed up by faxing a brief letter confirming the discussion. SA422. The letter itself was not a document request, nor did it indicate when an actual request might come. *Id.* Black's attorneys testified at trial, without contradiction, that they had no communication with Black on May 19 or 20 about this informal heads-up. SA424-25, 427-28.

Black's attorneys received the actual document request on May 23. T.11345. The request paralleled the request that had been made to Inc. on March 29, seeking "[a]ll documents relating to any matters that are the subject of the allegations contained in the [SEC's] Complaint." SA153 (first alteration in original).

Meanwhile, on Friday morning, May 20, 2005, Black's assistant Maida decided to pack boxes of Black's papers, personal mementoes, and other items in anticipation of the eviction that was scheduled to occur six business days hence.⁵ The boxes included items such as Black's personal bank account information, correspondence, and writings. Maida was not selective; she simply transferred entire files of material from office drawers into moving boxes. SA447-48, 450.

Black had not directed Maida to box up the office, and he had no involvement in packing the boxes or choosing their contents. SA430-433, 440-41. Although Maida was aware that lawyers involved in various litigation had been poring over Black's files for months (SA434; T.11562), she did not know about the SEC investigation and had never discussed the subpoenas or any criminal investigation with Black (T.11455, 11482).

Inc.'s President, Don Vale, authorized Maida to take the boxes out of the building; she intended to bring them to her home, where she was setting up a temporary office. T.11439-40. Maida asked a security guard to move the boxes to her car. The guard did so, but another Inc. executive later told him to bring them back into the building pending the Inspector's approval. T.10823. The Inspector declined permission at that time because a formal policy on document removal had not been finalized. T.10824. The boxes were left at the bottom of a stairwell, next to a door leading to the parking lot, in plain view of security cameras. SA436; Black Video 1 (Cam 8).

⁵ Due to a holiday in Canada, May 21-23 was a long weekend.

Soon thereafter, Maida spoke with Black by phone and told him about the problem she had had trying to move the boxes in anticipation of the eviction. Black, who worked out of his Toronto office only sporadically and was in town no more than four months out of the year, was “irritated.”⁶ T.11501-02, 11565. He arrived at 10 Toronto at 3:42 p.m. on May 20 (security camera footage records the time) and met with people elsewhere in the building. T.10729, 11444. His driver left with the car and returned sometime later. T.10741.

About 90 minutes later, with Maida observing, Black and his driver transferred the 13 boxes from the stairwell to his car, which was parked in the lot next to the building. SA411-12, 414. Black had not looked inside the boxes or asked Maida what they contained. SA440. It was daylight, inspectors apparently were still in the building, and the employee parking lot was still nearly full. SA416, 458.

Black knew he was being observed on camera by security guards and being recorded on tape: the security video shows Black pointing to the camera, and also shows his driver looking up at it. SA417, 456. Maida also knew that everything was being captured on video. SA438, 452-54. The next business day, a Canadian court ordered the boxes returned, and Black promptly complied. T.12977.

The government charged that, in removing the boxes, Black intended to obstruct SEC and U.S. criminal investigations by making documents unavailable to federal investigators, in violation of 18 U.S.C. § 1512(c). While the boxes contained some copies

⁶ Black spent a large amount of his time in London, running the *Daily Telegraph*. T.7449.

of business documents, including the APC non-compete agreement (SA459), the government was unable at trial to identify a single document relevant to the U.S. government investigations that had not already been produced to the SEC. Nor did the government produce evidence that Black had removed anything from the boxes, the contents of which were admitted into evidence and consisted mostly of personal paperwork, including files pertaining to Black's household and his deceased brother's estate. T.11564-65. Canadian authorities have not charged Black with violating the court-ordered document retention policy.

SUMMARY OF ARGUMENT

This was an extraordinary case. The jury acquitted defendants on all of the counts reflecting the government's principal theory, *i.e.*, that defendants allegedly schemed to steal millions from International through sham non-compete agreements with the purchasers of International's newspaper properties who neither requested nor cared about defendants' agreement. The jury convicted on a rump set of counts for which the evidence was insufficient and the legal theory invalid; in any event, the verdicts were infected by prejudicial trial errors.

I

The APC payments (Counts 1 and 6) involved distributions to the Ravelston Executives totaling \$5.5 million, characterized as non-compete payments to take advantage of favorable Canadian tax treatment. These payments were originally charged as a fraud on both International and Canada, but the government abandoned the fraud-on-Canada theory before trial, leaving only a scheme to defraud International.

That charge was put to the jury on the alternative theories that defendants schemed to defraud International of money or property or to deprive it of its right to defendants' honest services. In fact, neither theory was supported by the evidence, and the honest services theory was legally flawed.

The government's principal contention at trial was that Radler and the other Ravelston Executives, assisted by Kipnis, outright misappropriated moneys belonging to APC. Had the theory been sustainable, the government would have had a legally sufficient case without regard to the honest-services allegation. To the extent the government relies, as it has from time to time, on the claim that such a misappropriation was also a deprivation of honest services, that would be true enough, though it would add nothing. The government's problem is that there was insufficient evidence of either a scheme to misappropriate or to deprive the Company of defendants' honest services, and, in any event, the jury was erroneously instructed on the honest services doctrine, permitting it to convict without ever finding a scheme that contemplated injury to International or gain to defendants at the Company's expense.

a. The money/property theory as applied to the APC payments was part of what the government called a straight "money grab" of funds allegedly belonging to International, not defendants. But in a turn of events that is surely rare in this Court's annals, the prosecution's principal witness, Radler, gave unequivocally exculpatory testimony that he understood the sums in question to be due to Ravelston as management fees that had been duly approved by International's Board. If Radler was

right, and all that happened was a recharacterization of moneys that APC owed anyway, there was no money/property scheme to defraud.

In fact, the government never attempted to prove that Radler was mistaken and, in any event, failed to prove that he was. It showed that the distributions were characterized as non-compete payments rather than management fees, but that was entirely consistent with Radler's plan to derive a Canadian tax benefit for himself and the other Ravelston Executives and therefore provided no basis to reject Radler's management-fees explanation. No witness testified that APC did not owe these payments to Ravelston, and the government offered no evidence that the management fees were otherwise paid; had they been, it should have been easy enough for the government to show it. In short, there was no evidence that could have permitted the jury to find beyond a reasonable doubt that defendants schemed to defraud International, through its subsidiary APC, of money that belonged to the Company and its shareholders, as opposed to Ravelston and its executives.

b. In any event, there was no evidence that could have permitted the jury to find that defendants knew, or even had reason to know, that the checks the Ravelston Executives received from APC constituted misappropriated funds that rightfully belonged to APC. Radler testified that he thought that International owed Ravelston the money; he told Kipnis that the payments were due as management fees but should be recharacterized, and documented, as non-compete payments. Under such circumstances, there is no basis to infer that the other defendants knew that the APC money they received was misappropriated.

c. Nor was there any more substance to the government's honest services theory as an independent basis for conviction. The typical honest services prosecution involves manifestly dishonest conduct demonstrably adverse to the entity to which the defendant owes a duty of honest services, such as government officials who take bribes, purchasing agents who receive kickbacks for steering business to particular vendors, or corporate insiders who misappropriate confidential information for their own advantage. In each instance, the dishonest conduct plainly breaches a duty owed to the charged victim of the fraud.

This case is fundamentally different. Uncontradicted expert evidence indicated that recharacterizing management fees as non-compete payments, provided binding non-compete agreements were in fact executed, was entirely lawful tax planning under then-existing Canadian tax law. Thus, the recharacterization was not itself dishonest at all. Moreover, even if the recharacterization had been legally problematic, any harm would have been to Canada, not International, and Canada was not a charged victim in this case. In short, the government failed to prove the charged breach of duty of honest services owed by defendants to International. In this connection, we urge the Court to adopt a narrowing construction of § 1346 that avoids the serious constitutional issues the statute otherwise presents as a result of blurring the line between breach of fiduciary duty and criminal fraud.

Furthermore, the case went to the jury on a fundamentally flawed and unprecedented honest services theory. The prosecution was allowed to make out its claim of honest-services fraud simply by showing that Radler and defendants used their

positions in International to seek a personal tax benefit for the Ravelston Executives. But this Court has previously indicated that, while there need not be proof of a direct pecuniary injury to the entity to which defendants owe a duty of honest services, the gain must be at that entity's expense, not at the expense of an unrelated third party. Here, however, the jury was not required to make any such finding.

Because this was a legal error that permitted the jury to convict without the need to find an element of honest services mail fraud, defendants are entitled to a new trial under the rule of *Yates v. United States*, even if the Court concludes that the evidence was otherwise sufficient to make the requisite finding.

II.

The Supplemental Payments convictions (Count 7) rest on an equally unsound footing. There was evidence that Kipnis had inadvertently failed to include authorized individual non-compete provisions in the Forum and Paxton transactions, leaving no documented basis for making non-compete payments to the Ravelston Executives. There was, however, no evidence that any defendant was aware of Kipnis's mistake (even Radler apparently did not learn of it until 2003). Indeed, Boulton simply received an unlabeled \$15,000 check, Black had conversations with Radler that appeared to confirm that the funds were being paid pursuant to the approved Forum and Paxton non-compete provisions, and Atkinson was told by Radler that the payment he received had been approved. Accordingly, there was no basis for the jury to find the element of culpable knowledge.

There was also insufficient proof of the charged mailing required to bring the Supplemental Payments within the government's jurisdiction to prosecute as mail fraud.

III.

The verdicts were also infected by two highly prejudicial instructional errors, requiring at least a new trial.

a. Defendants' culpable knowledge was hotly contested at trial, but the government lobbied for, and the court gave, a conscious avoidance, or "ostrich," instruction, permitting the jury to convict without finding that defendants had actual knowledge of any alleged misappropriations. This was error because there was no evidence of suspicious circumstances placing defendants on notice of the high probability that a crime was occurring, nor was there evidence that defendants took purposeful steps to avoid learning that an offense was in fact occurring. In light of the weakness of the government's evidence of defendants' actual knowledge of wrongdoing, the instruction was devastating, creating an unacceptable risk that the jury would rely on the confusing and inapposite doctrine of conscious avoidance to convict.

b. The government placed great stress at trial and in its closing argument on alleged misrepresentations in International's 2002 and 2003 SEC disclosures regarding the nature and timing of the non-compete payments, which it repeatedly suggested was the crime defendants committed. But these statements were made more than a year after the end of the charged mail fraud scheme. While evidence of them may have been admissible for its bearing on defendants' state of mind at the time of the alleged fraud,

the statements themselves were not the crime nor even part of the charged offense. Accordingly, they could not supply the basis for conviction. Defendants repeatedly requested a limiting instruction that would make this clear to the jury, but were repeatedly rebuffed. The district court agreed only to give the jury the meaningless instruction that defendants were “not charged with securities fraud,” which, in the circumstances, entirely failed to address the real concern: that defendants might be improperly convicted of *mail fraud* on the basis of the uncharged crime of securities fraud predicated on the content of these statements.

IV.

Finally, Black alone was convicted of obstruction of justice for removing boxes of documents from his long-time offices (from which he was being evicted) with the alleged intent to conceal them from U.S. government investigations. This charge was baseless. All that the government showed was that Black indeed removed the boxes (containing extensive personal papers and copies of some business documents) and that he was aware at least of the pending SEC proceeding. The government’s case lacked any evidence, however, that could possibly permit a reasonable jury to conclude that Black’s purpose in taking these documents was to obstruct any investigation.

Indeed, far from being established beyond a reasonable doubt, such a conclusion was utterly implausible. Apart from the fact that Black acted in the face of impending eviction to remove years’ worth of personal photographs, calendars, and other papers and effects, he had known of the pending SEC investigation for well over a year and had made no prior efforts to conceal any documents. Quite the opposite: Black had

given his lawyers free rein for months to review and copy documents in his office and homes in order to comply with SEC subpoenas. Against this background, it was at best grossly speculative to assume that Black would have had any reason to suppose that he was removing relevant documents that had not already been turned over. And in fact, when the boxes were returned a few days later at a Canadian court's request, they were not shown to contain anything material to the federal investigations that had not already been copied and turned over.

Sensing the weakness of its own case on obstruction, the government distracted the jury with the (unproven) hypothesis that in removing the boxes Black had violated a Canadian court order. Over Black's objections, the prosecutors played up this sideshow as evidence that Black must have had an obstructive motive. This prejudicial misuse of the Canadian-court-order evidence provides a separate basis for awarding a new trial, even if the Court concludes that there was sufficient evidence of obstructive intent.

ARGUMENT

Standard of Review

A district court ruling on a motion for judgment of acquittal is reviewed *de novo*. E.g., *United States v. Peters*, 277 F.3d 963, 967 (7th Cir. 2002). In assessing sufficiency claims on appeal, the evidence is viewed in a light most favorable to the government to determine whether a rational juror could have found the essential elements of the offense beyond a reasonable doubt. E.g., *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Peters*, 277 F.3d at 967. While this admittedly is a high burden for a defendant, a jury's verdict is not unimpeachable. See *United States v. Radomski*, 473 F.3d 728, 730-31 (7th

Cir. 2007). In addition, the standard of review “cannot be used as a substitute for essential proof.” *United States v. Kitchen*, 57 F.3d 516, 523 (7th Cir. 1995). The government bears the obligation of proving the essential elements of the crime charged.

Jury instructions are reviewed for abuse of discretion (*United States v. Messino*, 382 F.3d 704, 711 (7th Cir. 2004)), unless the instructions are based legal errors, in which case they are reviewed *de novo* (*United States v. Smith*, 308 F.3d 726, 740 (7th Cir. 2002)). A decision to give a conscious avoidance instruction is reviewed *de novo*. *United States v. Giovannetti*, 928 F.2d 225, 225-26 (7th Cir. 1991) (per curiam) (“*Giovannetti II*”). (See *infra* at n. 25.) Evidentiary rulings are reviewed for abuse of discretion.

I. DEFENDANTS WERE ENTITLED TO ACQUITTAL OR AT LEAST A NEW TRIAL ON THE APC COUNTS.

Counts 1 and 6 (involving the \$5.5 million APC distribution) charged a mail fraud on alternative theories: (1) defendants schemed to obtain money or property from International and (2) they schemed to deprive International and its shareholders of their “intangible right to [defendants’] honest services.” The jury returned general guilty verdicts on each count. These convictions are flawed for two reasons:

First, the evidence was insufficient to support the verdict on a money-or-property theory. The government’s evidence on the APC counts consisted almost entirely of the testimony of one witness – David Radler. But, far from providing evidence to support the verdict on the APC counts, Radler’s testimony established defendants’ *innocence* of a scheme to misappropriate International’s money. The government not only failed to contradict Radler’s testimony, but it also offered nothing

to support an incriminating view of the payment. Certainly, there was no evidence that defendants knew or believed anything different from Radler's innocent belief. In the end, the government was reduced to telling the jury in summation that its own witness, Radler, "was the defense case" and not a prosecution witness. T.14910. In short, there simply was no way any rational juror could have found beyond a reasonable doubt that defendants contemplated (or carried out) a scheme to misappropriate money or property from International.

Second, the government's confusing honest services theory was also unsupported by sufficient evidence. In addition, it was legally flawed. Defendants were charged with defrauding International. But none of the evidence pertaining to the charged scheme constituted the kind of dishonest conduct that could support a mail fraud conviction under Section 1346. Moreover, the jury was permitted to return a guilty verdict on an "honest services" theory without the need to find that defendants had sought to gain "at the expense of International," which is essential to the offense. Instead, the jury was allowed to predicate guilt on a finding that defendants used their positions at International to reduce their Canadian tax liability, even if their tax strategy caused no harm to International. Of course, Canada was not a charged victim of the alleged fraud, and defendants certainly owed no duty of honest services to Canada under Section 1346. Nevertheless, the jury was free to convict for mail fraud without finding a scheme to defraud the charged victim, International, within the meaning of the governing statute.

For these reasons, defendants are entitled to a judgment of acquittal. At a minimum, defendants are entitled to a new trial on the APC counts because the deficiency in the honest-services instruction is a legal one permitting the jury to rest its guilty verdict solely on a legally invalid ground. See, e.g., *Yates v. United States*, 354 U.S. 298 (1957); *United States v. Colvin*, 353 F.3d 569 (7th Cir. 2003).

A. Insufficient Evidence Of A Scheme Involving Knowing Misappropriation Of International's Money Or Property

The government's primary theory at trial was that the APC payments were simple "money grabs." SA233-34; T.855-56. To prove that theory, the government had to show that defendants knew that the Ravelston Executives had no right to the \$5.5 million but defendants nevertheless schemed to defraud International into parting with it. This the government utterly failed to do.

There was no proof that the money was misappropriated from International or that, even if it was, defendants knew that Radler's distribution to them constituted a misappropriation. Instead, Radler himself, the government's key witness, testified that he believed that the money represented accrued but unpaid management fees, legitimately owed by APC to himself and the three others, through Ravelston. See pages 12-13, *supra*. There is no evidence in the record contradicting this testimony – certainly not in any way that could be accepted by a rational juror beyond a reasonable doubt. The evidence was insufficient to sustain the convictions on Counts 1 and 6.

1. Insufficient Evidence Of Misappropriation

According to the government's version, Radler conceived and executed the charged APC scheme. By his own admission, Radler alone initiated the distributions from APC and their classification as non-compete payments. And he did so to minimize defendants' Canadian tax burden. SA372, 379-80. He also made clear that he believed the payments came from money that International owed to Ravelston and that had already been approved by the Audit Committee, which is why he never sought further approval when the payments were made. SA382-83.

In early 2001, Radler believed that International still owed Ravelston management fees for 2000, and that APC's portion of those fees was \$5.5 million. SA386, 392-93.⁷ There was no evidence that Radler's assumptions were unreasonable; between 1998 and 2000, Ravelston was paid between \$32 million and \$37.5 million per year in management fees, and responsibility for those fees was annually apportioned among various International subsidiaries, including APC. T.7066-69; DX JB Audit 16.

According to Radler, because APC had not yet paid its portion of the 2000 management fees, he caused International to issue the payments but characterize them as consideration for non-compete agreements, rather than management fees. He did so, he testified, because that characterization provided a "good chance" that the executives would receive their money "tax-free in Canada." SA380, 386. Radler ordered Kipnis to draft non-compete agreements between the executives and APC, necessary to qualify

⁷ While Radler's testimony was cast in terms of his "belief," he never suggested that this belief was erroneous, and, as we show below, the government failed to prove that it was.

the payments for favorable tax treatment. This was Radler's consistent explanation for the source and nature of these payments, on direct and on cross-examination.

In short, the government's misappropriation theory was based almost entirely on Radler's testimony that he directed the payment of money he believed was rightfully owed to himself and the other Ravelston Executives, and that he did so in a manner designed to help the executives avoid Canadian taxes. That simply is not evidence of a scheme to defraud International in any way, and certainly not to deprive it of money or property. At most, Radler's testimony shows that he and the others tried to avoid paying Canadian taxes. But Canada wasn't the victim of this supposed fraudulent scheme; International was. And the conduct shown by the evidence contemplated no loss to International as a result of the APC non-compete payments.

While the jury was not required to believe Radler's testimony, defendants bore no burden of proof, and the government introduced no evidence that the jury could possibly have construed as proof that these payments were not, in fact, sums due and owing to the recipients, through Ravelston, as approved management fees. To begin with, it was undisputed that International had approved payment of substantial management fees to Ravelston for 2000, and there was no claim that this approval was fraudulently procured.⁸ Nor did the government prove that APC's share of these approved fees had otherwise been paid. While the Court must construe the evidence in the light most favorable to the verdict, that does not mean speculation can fill critical

⁸ The government said as much in closing. See T.15089 ("Remember, nothing illegal about the management fees. No one saying that.").

gaps in the government's case. *Peters*, 277 F.3d at 967 (reversing conviction based on insufficient evidence, explaining that "each link in the chain of inferences must be sufficiently strong to avoid a lapse into speculation").

In denying post-trial relief, the district court said that the jury "could reasonably have concluded that Radler's testimony was simply wrong." SA193. But the jury's rejection of exculpatory testimony is not itself proof of guilt. The jury needed some affirmative basis on which rationally to draw a conclusion, beyond a reasonable doubt, that the money belonged to International and had been, as the government claimed, stolen from it.

In prior filings, the government has argued that a rational jury could have concluded beyond a reasonable doubt that the payments were not management fees because (1) the checks were drawn on APC's accounts rather than Ravelston's; (2) the payments were not recorded in APC's ledgers as management fees; (3) International's controller, Creasey, when asked on cross-examination about the payments, stated that he did not "understand" the payments to have been management fees; and (4) the documentation for the payments (including the non-compete agreements) did not describe the payments as management fees. But most of this evidence was consistent with, and none of it contradicted, Radler's testimony.

First, it is wholly unremarkable that the payments came from APC rather than Ravelston (or that a trial witness, Gordon Paris, testified that this payment came "from Hollinger International"). Radler testified that the payments represented APC's portion of the 2000 management fees. No evidence was offered to suggest that Radler, a high

Ravelston executive, lacked authority to direct payments International owed to Ravelston to the Executives personally.

Second, there is nothing significant about the fact that the payments were not recorded as management fees on International's books, given the decision to characterize the payments as non-compete consideration for Canadian tax purposes. And in any case, there was no evidence that defendants had anything to do with how International recorded these payments. See T. 3612-13.

Third, Creasey's testimony that he did not "understand" the payments to be management fees is hardly probative. When asked directly whether the fees were otherwise paid, Creasey responded: "I have no knowledge that it was paid but I have no reason to doubt that it wasn't paid." SA252. The testimony amounts to nothing more than a plea of ignorance concerning whether the management fees were paid once, twice, or not at all.⁹

This testimony does not even begin to demonstrate a misappropriation of International's money. What's more, Creasey also acknowledged that he had received a memo in November 2003 from one of Radler's subordinates (SA539) discussing the fact that the APC payments *were* intended to satisfy approved management fee obligations. SA250-52. There is no evidence that Creasey responded that the fees had already been paid. Indeed, if the management fees due to Ravelston had been separately paid, that

⁹ In fact, the government elicited this from Creasey. See SA243 ("Prosecutor: "As of May 2001, Mr. Creasey, what, if anything, did you know about payments that had been made to Mr. Black, Mr. Radler, Mr. Boulton and Mr. Atkinson by American Publishing Company?" A. "I had no knowledge.").

should have been simple enough to prove. Even for a relatively large company, \$5.5 million is a significant enough sum that some record would have been made of its disbursement. But the government offered no such evidence.¹⁰ In short, Creasey's testimony is not affirmative evidence from which a rational jury could find a misappropriation from International of \$5.5 million, and certainly not enough to overcome Radler's unequivocal testimony that he believed the money was due to Ravelston.¹¹

Fourth, it is simply irrelevant that the payments were described as "non-compete" payments and not as management fees in the non-compete agreements and other contemporaneous documentation. That description, far from providing a basis for disbelieving Radler's testimony, is entirely consistent with his account. Radler testified that the payments were purposely re-designated as consideration for non-compete agreements to take advantage of favorable Canadian tax treatment.

¹⁰ Indeed, the government called an IRS agent to analyze the effect of these payments on International's tax returns, and she testified that she was unable "to make any definitive determinations about how the APC payments were treated on the 2000 tax returns." T.11083-84.

¹¹ The government's failure to offer any evidence contradicting Radler is telling, because prosecutors *knew* that Radler planned to testify the way he did: his trial testimony was completely consistent with the testimony he gave before the grand jury on the issue of the APC payments. R. 916, at 8. It was also consistent with the allocution in Radler's plea agreement, in which he stated that the APC payments had been "mischaracterized" and were intended "to take advantage of the potential tax benefits that genuine non-competition payments received under Canadian tax law." R.21 at 20-22. Radler did not assert that the APC payments were misappropriated or that defendants had not been entitled to them. If there were evidence to show that Radler was mistaken, the government had plenty of opportunity to find and adduce it at trial.

In sum, the government simply failed to provide any evidence from which a rational juror could have concluded beyond a reasonable doubt that defendants misappropriated APC's money. Given Radler's uncontradicted testimony, the most the government proved was that defendants reclassified payments they were actually owed, in an effort to avoid paying more Canadian taxes. Those acts are not a scheme to defraud International on any theory, and are certainly not a money/property deprivation.

2. Insufficient Evidence Of Knowledge Of Any Misappropriation

The evidence was insufficient for another reason: even if the APC money was not management fees owed to the Ravelston Executives, the jury was also required to find that defendants *knew* the executives were not entitled to the money and nevertheless schemed to deceive International into parting with it. *United States v. Palumbo Bros., Inc.*, 145 F.3d 850, 878 (7th Cir. 1998) (“[m]ail fraud *** requires knowing participation in a fraudulent scheme”). No evidence — none — supports that conclusion.

Even if Radler was mistaken that the APC payment was due to Ravelston as management fees, there is not a whisper of a suggestion that any of the defendants knew of that mistake. To the contrary, defendants had every reason to believe that the payments were approved and appropriate.

As to Kipnis, Radler told him that the payments represented management fees. A reasonable juror could not suppose that Kipnis believed anything different from what he was told. To substantiate its claim that the evidence showed Kipnis's knowledge of

misappropriation, the government has placed – and we expect that it will continue to place – great reliance on his statement to the Special Committee that he thought the APC payments “silly.”¹² The government’s reliance is well off the mark. Kipnis did believe the payments were silly: he believed the Ravelston Executives would have to pay Canadian taxes on money they received as previously approved management fees. And he accordingly believed that drafting non-competes for tax purposes was silly. T.9436-37. But, at best for the government, his statement is an example of evidence that is equally capable of an innocent explanation and therefore insufficient to support conviction. See *United States v. Harris*, 942 F.2d 1125, 1130 (7th Cir. 1991).

Black is in a similar position. The only evidence that Black knew anything about these payments was a reference in Radler’s testimony to “conversations” with Black concerning the APC payments. T.7937. Because Radler and Black were the principal owners of Ravelston, they had the ability to direct Ravelston’s income in any way they chose, including directly to the Executives. The Radler-Black conversations, if anything, support the conclusion that Black shared Radler’s understanding that the APC payments were management fees. In any event, the conversations are certainly not evidence that Radler and Black corruptly schemed to deprive International of money that rightfully belonged to shareholders, or that Black believed the opposite of Radler’s belief. And those amorphously described conversations are the only record evidence that Black knew anything at all about the nature of these payments.

¹² The evidence of Radler’s statement to Kipnis and of Kipnis’s statement to the Special Committee was admissible only as to Kipnis. T.9420.

As to the other defendants, there is no evidence of culpable knowledge whatsoever. There was no suggestion that Boulton or Atkinson were told anything at all about these payments (other than that they were approved), let alone something different from what Radler told Kipnis (and presumably told Black). The government proved that Boulton and Atkinson executed non-compete agreements and received payments in return (indeed, those facts were undisputed), but there was no evidence that either of them believed his own payment to be unlawful or knew or suspected that the money he received had been somehow misappropriated from International.

The record of Atkinson's knowledge, for example, is sparse. Radler did not testify to having had a single conversation with Atkinson about the APC payments. But the evidence did reflect Atkinson's understanding that the payment had been approved. T.3615-16, 9490-91; DX Atkinson Torys 54. And Atkinson's undisputed actions squarely belie any suggestion that he believed the payments to be unlawful. To the contrary, the government introduced evidence that Atkinson received his, Black's, and Boulton's non-compete agreements from Kipnis, International's corporate counsel, along with a letter requesting that Atkinson "forward one fully executed counterpart to me for our records." SA533. Shortly thereafter, Atkinson responded to Kipnis, enclosing the executed agreements for International's records. SA534. The jury could hardly infer from this evidence that Atkinson believed his payment or any of the others' were unauthorized.

As to Boulton, the record is completely barren. The only evidence concerning Counts 1 and 6 was Boulton's receipt and execution of a binding non-compete

agreement forbidding him from competing with APC and its affiliates for three years after termination of his employment with International, and his simultaneous receipt and deposit of an APMS check for \$137,500 as consideration for his non-compete covenant. There was no evidence that Boulton had any conversation, read any memorandum, or participated in any other type of communication about this payment. Indeed, there was no evidence that Boulton even knew that any other executive signed a non-compete agreement with APC or received payment for doing so.¹³ The district court recognized the weakness of the evidence as to Boulton on the APC counts when it declined at sentencing to impose on Boulton as a foreseeable “loss” the full amount of the APC payments received by Radler, Black, and Atkinson. A95-96.

Ultimately, the jury was asked to infer guilty knowledge from these three defendants’ mere receipt and execution of non-compete agreements and corresponding consideration. Indeed, the district court concluded (at the government’s urging) that the agreements themselves were inherently suspicious because the executives were “pa[y]ing themselves not to compete with themselves” at a time when APC only owned one small newspaper in California. SA191. The district court was mistaken. The non-compete agreements were binding and carried real consequences for the covenantors. The agreements did not take effect until after the executives left International’s employ,

¹³ It would have been entirely reasonable for Boulton to have assumed that only he was being asked to sign a post-termination non-compete agreement, since he was beginning to withdraw from full-time employment with the Company, a process that included his removal as CFO in 1999. T.5570, 6580. Moreover, Boulton presented expert testimony that his agreement was common in the industry and the consideration for it consistent with industry standards. T.12057-61.

and they prevented the executives from competing against any of APC's "affiliates," including International. SA535-38; GX APC 8, 11, 15. At the time the agreements were executed, International owned approximately 100 newspapers in the Chicago area alone. T.9356-57; DX JB Newspapers 1. There was nothing about these agreements, or the payments the Ravelston Executives received, that made the transaction an obvious "sham," particularly given the undisputed expert testimony that such agreements were legitimate tax-structuring vehicles in Canada. That is, the agreements would satisfy Canadian tax law so long as they were binding and enforceable. If the agreements were for tax-structuring purposes, as Radler so testified, nothing about their content was inherently suspicious. No rational jury could conclude beyond a reasonable doubt that the executives knew they were receiving misappropriated funds simply because they executed non-compete agreements and accepted payments in return.

In denying post-trial relief, the district court made much of the fact that Black, Atkinson, and Boulton did not disclose the APC payments in their proxy questionnaires and that the payments were misdescribed in International's SEC filings more than a year later.¹⁴ SA183, 192-93. "This evidence supports an intent to defraud

¹⁴ International's 2001 and 2002 10-K disclosures (filed in April 2002 and 2003, respectively) stated:

In connection with sales of United States newspaper properties in 2000, to satisfy a closing condition, the Company, Lord Black and three senior executives entered into non-competition agreements with the purchasers pursuant to which each agreed not to compete directly or indirectly in the United States with the United States businesses sold to purchasers for a fixed period, subject to certain limited exceptions, for aggregate consideration paid in 2001 of \$600,000. These amounts were in addition to the aggregate consideration paid in respect of these non-competition agreements in 2000 of \$15,000,000. Such amounts were paid to

International,” the court concluded, “because if Defendants had believed the payments were legitimate, they would not have misrepresented the true nature of the payments to shareholders in public filings.” SA192.

But these facts cannot substitute for evidence of contemporaneous guilty knowledge. For one thing, the APC payments were treated as having been made in 2000, which means disclosure would have been required in the January 2001 questionnaire. The executives had not even received their payments at that time. As for inaccuracies or misstatements in the SEC disclosures issued more than a year after the payments, the evidence showed that these disclosures were drafted entirely by International’s outside lawyers and auditors, not by any of the defendants, and there was no testimony from the Torys lawyers that any defendant had misled them. SA282-85, 548. In any event, this evidence could be considered at most post-scheme concealment, insufficient by itself to support an intentional fraud conviction. See *United States v. Rose*, 12 F.3d 1414, 1421 (7th Cir. 1994) (“false exculpatory statements cannot be the sole basis for conviction”) (emphasis in original). See *infra* at § I.B.2.

* * * * *

Lord Black and the three senior executives. The Company’s independent directors have approved the terms of these payments.

See, e.g., SA566. The disclosure was inaccurate insofar as it described the APC payments as having been made either “to satisfy a closing condition” or “in connection with” any “sales.”

This case is most unusual. The government's chief witness refuted its central theory, and no other evidence was offered to prove defendants' guilt. The evidence was plainly insufficient, making a judgment of acquittal on Counts 1 and 6 appropriate.¹⁵

B. The "Honest Services" Theory Was Legally Invalid.

The government has never adequately explained what its theory of honest-services fraud actually was, and it has given conflicting interpretations of the jury's verdict. Most recently, in its bail opposition in this Court, and consistent with the main thrust of its trial case, it has asserted that the honest services deprivations consisted of the alleged misappropriations themselves (GR 21-23), thereby collapsing the honest-services theory into the money/property claim. At other times, in defending the honest-services theory post-trial and in opposing bail in the district court, the government claimed that the jury could have reached the following conclusions: (1) defendants re-characterized legitimate payments as compensation for non-compete agreements so that some of them could save on their Canadian taxes, and (2) they made false SEC disclosures more than a year after that recharacterization, in order to hide the payments' true nature from the SEC and International's shareholders. R. 904 at 2-3, 9-11; R. 1027 at 8-10, 14-16.

¹⁵ The defendants who received prison terms had their sentences substantially enhanced because the district court found large monetary losses to International stemming from the APC payments. If the evidence was insufficient to prove that International suffered any loss in that transaction, the sentences would be dramatically shorter, even if the convictions could be sustained on an honest-services theory. An insufficiency holding on the money-or-property prong would accordingly require, at a minimum, a remand for resentencing.

One thing is certainly clear: the jury was instructed that it could convict on honest services without ever finding that defendants had sought to deprive International of money or property. The convictions are therefore flawed even if the government had introduced sufficient evidence to allow a finding of a money/property deprivation: the jury was never instructed that it *had* to find such a misappropriation in order to convict. Indeed, it was explicitly told the opposite. Consistent with an instruction given over defense objection, the jury could have convicted if it found that defendants used their positions at International to obtain Canadian tax savings for the Ravelston Executives and then lied about the payments long afterwards. But those facts, even if proven (and we submit that there was insufficient evidence of any knowing, material misstatements), are an improper basis for a mail fraud conviction. It was error to instruct the jury that it could convict on an honest-services theory even without finding that defendants had schemed to misuse their position for private gain at the expense of International, the charged victim. Accordingly, defendants are entitled to a new trial, even if this Court believes (contrary to our argument above) that sufficient evidence supports guilt on a money/property theory.

1. Failure To Instruct That Private Gain Must Be At The Victim's Expense

In order to prove that defendants violated the mail fraud statute by depriving International of its right to their honest services, the government was required to show that they “used the interstate mails *** in furtherance of a scheme to misuse [their] fiduciary relationship for gain *at the expense of the party to whom the fiduciary duty was*

owed.” *United States v. Hausmann*, 345 F.3d 952, 956 (7th Cir. 2003) (emphasis added). The charge that a defendant defrauded his employer by seeking to save money on his tax returns falls short of this standard unless his actions also contemplate harm (or “expense”) to his employer. But under the government’s theory and the corresponding instruction, the jury was not required to find that defendants sought to gain at International’s expense. Rather, the jury could have convicted if defendants sought (or sought to facilitate) a gain at the expense of Canadian taxing authorities.

The trial court instructed the jury that to convict on an honest-services theory, it had to find that “the particular defendant you are considering misused his position for private gain for himself and/or a co-schemer.” SA524. The jury was further instructed that “[t]he mail or wire fraud statute can be violated whether or not there is any monetary loss or financial damage to the victim of the crime. The scheme to defraud need not have succeeded for the mail or wire fraud statute to be violated.” SA528. While both statements are accurate as far as they go, they are incomplete. Consistent with these instructions, the jury could have convicted defendants on an honest services theory without finding that the Ravelston Executives gained “at the expense” of International, the only charged “victim” of the charged APC scheme. The effect was that the jury could have convicted without ever passing upon the government’s main claim at trial – that the APC payments were a misappropriation (“money grab”) of International’s funds.

Defendants urged the trial court, unsuccessfully, to amend the instructions in order to convey to the jury that defendants’ gain had to be at International’s expense.

See SA498 (seeking instruction that “the scheme, if successful, must wrong the alleged victim’s property rights in some way”). The district court denied the request, deciding that a foreseeable-harm requirement “[i]s not the law in this circuit.”¹⁶ *Id.*

That was error. While this Court has held that the government need not show *pecuniary* harm to the victim in order to prove a proper “honest services” charge, it must prove that defendants worked a *fraud* on their alleged victim (or at least intended to). As explained in *United States v. Bloom*, 149 F.3d 649 (7th Cir. 1998), sometimes a “misuse of office” for “private gain” will suffice to satisfy the statute because the “misuse” itself constitutes a fraud on the victim. As the *Bloom* Court noted, the vast majority of this Circuit’s honest-services cases stemming from fiduciary breaches and “misuse” of position involve defendants who “converted to private use information that they possessed by virtue of their *** positions.” *Id.* at 655 (collecting cases). “Secret conversion of information received in a fiduciary capacity is a form of fraud against the owner of that information.” *Id.*

But this Court has never upheld a mail fraud conviction on an honest-services theory when the defendant has not sought private gain at the expense of the party to

¹⁶ The cited instruction was defendants’ final attempt to convey this point to the jury after earlier unsuccessful efforts. Indeed, defendants’ initial submission of a proposed honest-services instruction would have required the jury to find that a defendant “intentionally breached his fiduciary duty for personal gain for him or another,” and “in doing so, the defendant intended to defraud the corporation and its shareholders.” R. 471, at 16. During the charge conference, the government specifically objected to any suggestion in the instructions of a foreseeable-harm requirement. See SA231 (“[Prosecutor]: I just don’t think the [case law] supports the notion that the defendant can enrich himself via fraud even if he believes that it won’t harm the corporation in the long run, which is, I think, more what [defense counsel is] arguing than that these non-competes actually benefited the corporation.”).

whom he or she owed a fiduciary duty. The paradigmatic honest services cases involve public officials who accept bribes or kickbacks in exchange for official action, in breach of the duties owed to their office or their constituents. See, e.g., *United States v. Warner*, 498 F.3d 666 (7th Cir. 2007); *United States v. Spano*, 421 F.3d 599 (7th Cir. 2005); *United States v. George*, 403 F.3d 470 (7th Cir. 2005); *United States v. Genova*, 333 F.3d 750 (7th Cir. 2003); *United States v. Fernandez*, 282 F.3d 500 (7th Cir. 2002); *United States v. Fernandes*, 272 F.3d 938 (7th Cir. 2001); *United States v. Martin*, 195 F.3d 961 (7th Cir. 1999).

Honest-services cases like this one, involving private citizens (a rarer form of the offense), have in the past fit a similar factual pattern. Defendants in such cases invariably stand accused of misusing their positions for gain at the expense of their employers or clients – the victims of their frauds. See, e.g., *United States v. Segal*, 495 F.3d 826 (7th Cir. 2007) (insurance broker misappropriated segregated premium funds, in breach of fiduciary duty to clients); *Hausmann*, 345 F.3d 952 (lawyer took kickbacks from chiropractor, in breach of fiduciary duty to clients); *United States v. Lanas*, 324 F.3d 894 (7th Cir. 2003) (claims adjuster took kickbacks from vendors, in breach of duty to employer); *United States v. Montani*, 204 F.3d 761 (7th Cir. 2000) (executive took kickbacks from customer, in breach of duty to employer).

Here, by contrast, the government never claimed that defendants appropriated for themselves secret information received in a fiduciary capacity or that they accepted kickbacks or bribes at their employer's expense. The government has alleged, of course, that defendants stole International's money, a charge that – if proven – would

certainly be both an honest-services deprivation and a money/property misappropriation. But the jury was instructed that it could convict if it found either a theft of money or property or a deprivation of honest services. The necessary conclusion is that the honest-services prong permitted a conviction even if the jury rejected the government's money/property theory (as we argue it had no rational choice but to do). And in that circumstance, the only theory on which the jury could have convicted was the theory that Black, Atkinson, and Boulton "gained" by saving money on their taxes and that defendants "misused" their positions by causing the recharacterization of payments to be misdescribed in International's books and SEC disclosures. But those actions do not violate the honest services statute because the "gain" – the tax savings – could not possibly have been at International's "expense."

Indeed, Canadian tax savings would not even properly qualify as "private gain" under the statute. We are unaware of any case in which a possible tax saving – not to mention a perfectly lawful one – was held to constitute the sort of "private gain" anticipated by this (or any other) Circuit's honest-services jurisprudence. As this Court explained in *United States v. Thompson*, 484 F.3d 877 (7th Cir. 2007), "[t]he history of honest-services prosecutions is one in which the 'private gain' comes from third parties who suborn the employee with side payments, often derived via kickbacks skimmed from a public contract. Treating § 1346 as *limited to such situations* is consistent with its language." *Id.* at 884 (emphasis added). We question the wisdom of expanding the reach of this already broad and ambiguous statute to criminalize failures to disclose legitimate tax avoidance strategies. Further, if, as the evidence suggested (see p. 11,

supra), there was nothing “dishonest” about recharacterizing these payments as non-competes for Canadian tax purposes, it is hard to imagine how International was deprived of “honest services.”

2. Subsequent Misstatements In SEC Filings Could Not Be The Basis For Honest Services Fraud In This Case.

Since legitimate tax planning violates no fiduciary duty, the government has resorted to arguing that International was supposedly “harmed” by the allegedly false SEC disclosures, which were made a year after the alleged scheme terminated. In opposing post-trial relief, the government asserted that “[c]ausing” International to file these disclosures exposed it to civil liability. SA197. This cannot salvage the APC counts for three independent reasons.

First, even if there were evidence that any misstatements in SEC filings were material, that they were defendants’ knowing and deliberate acts, or that they harmed International (and there was no such evidence),¹⁷ the jury was not instructed that it

¹⁷ In fact, there was no evidence that any defendant drafted or caused to be drafted any inaccurate disclosure of non-compete payments. To the contrary, while preparing International’s Proxy in January 2002, Kipnis affirmatively sought advice from International’s outside counsel at Torys on whether and to what extent non-compete payments made in U.S. transactions should be disclosed. SA616. Defendants agreed with Torys’ conclusion that the payments needed to be disclosed, and Atkinson even encouraged Torys to work with International’s outside auditors at KPMG to accomplish this. SA600-03.

Torys drafted the disclosure that appeared in International’s next public filing, the 2001 Annual Report filed in March 2002. SA548, 563. Torys’ disclosure reported that an aggregate of \$15.6 million in payments had been made “[i]n connection with the sales of United States newspaper properties in 2000, to satisfy a closing condition.” (See *supra* at n.15). Torys sent Atkinson and Boultee this disclosure in draft, but without any suggestion that Torys was unsure of its accuracy or needed any facts to be verified. SA282-85. Atkinson did not comment on or suggest any revisions to Torys’ disclosure language. Boultee’s only comment was to suggest even fuller disclosure. DX Atkinson Torys 40. As discussed above, while Torys correctly disclosed the aggregate amount of payments, the language was inaccurate in several respects.

needed to find that the scheme intended such harm in order to convict. Indeed, as explained above, the instructions explicitly told the jury the opposite: it could convict simply if it found a misuse of position for private gain, whether or not International suffered or was meant to suffer any harm at all.

Second, the alleged misstatements were made more than a year after the end of the charged scheme. See SA65 (charging scheme from January 1999 to May 2001). Accordingly, any supposed harm caused to International by the SEC filings could not have been the basis of an honest-services conviction on Counts 1 and 6. The filings were, at most, post-scheme acts of concealment. See, e.g., *United States v. DiDomenico*, 78 F.3d 294, 303 (7th Cir. 1996) (“[A] conspiracy, and a conspiracy to conceal an earlier, completed conspiracy, are two different conspiracies”). The trial court denied defendants’ request for an instruction to the effect that “acts designed merely to conceal the existence of a charged scheme *** are not acts in furtherance of the scheme.” SA137. See also Part IV, *infra*. And since Counts 1 and 6 charged mail fraud, the government would be hard-pressed to explain how the specified mailings furthered fraudulent acts that did not take place until a year later.

Third, there was no “private gain” to defendants as a result of these disclosures. Because there was no “private gain” resulting from the supposed misuse of office in causing International to make inaccurate disclosures, the disclosures cannot form the basis of an honest-services conviction. *Bloom*, 149 F.3d at 655 (“[m]isuse of office (more

Atkinson’s and Boultee’s failure to catch these inaccuracies cannot be construed as “causing” International to disseminate false disclosures, but that is the sum total of their involvement in drafting the subject disclosure. And Black had no involvement whatsoever.

broadly, misuse of position) for private gain is the line that separates run of the mill violations of state-law fiduciary duty *** from federal crimes”).

3. The *Yates* challenge Was Preserved.

Because the evidence was insufficient to sustain the APC convictions on a money/property theory and because the jury was permitted to convict upon an improper honest-services theory, defendants are entitled to a judgment of acquittal on the APC counts. But even if the Court believes that the money/property theory was supported by sufficient evidence, defendants would still be entitled to a new trial under *Yates* if the Court agrees that the honest-services instruction was legally defective.

In the bail proceedings, the government argued (and the district court agreed) that the *Yates* new-trial argument is unavailable. With all due respect to the district court, that was error.

Defendants assertedly waived their right to complain about ambiguity in the general verdict because they objected to the government’s proposed verdict form. That form (which the government eventually withdrew [SA505, 519-20]) would have presented the jurors with special interrogatories requiring them to specify whether any guilty verdicts were based on a money/property theory, on an honest-services theory, or on both. While it is true that defendants objected to a special verdict for the jury’s initial deliberations, they did request that, if and when the jury returned a general verdict of guilt, it then be given special interrogatories such as the government sought. This was done precisely because defendants were “cognizant that the jury’s specification of the mail/wire fraud theory might be helpful to appellate review in the

event of a guilty verdict.” R. 737 at 3. This proposal, which the district court rejected, would have accomplished the goals the government later argued were stymied, without compromising defendants’ well-established right to a general verdict.¹⁸ Offering to give post-verdict special interrogatories satisfied any obligation defendants had to seek clarification from the jurors and certainly preserved their right to advance a *Yates* challenge on appeal. Exactly this procedure was approved in *United States v. Riccobene*, 709 F.2d 214, 228 n.19 (3d Cir. 1983) (noting that post-verdict special interrogatories may be appropriate because this practice avoids “the dangers usually involved in the use of jury interrogatories in a criminal case”).

4. Section 1346 Should Be Narrowly Construed To Avoid Constitutional Vagueness Problems.

Courts across the country have expressed the concern that § 1346 is fast becoming a picnic to which Congress brings the vague statutory text and prosecutors bring the meaning. This case illustrates the problem all too well. At different times, the government has alleged that defendants breached their “honest services” duty – and therefore committed a federal crime – by mislabeling payments for purposes of tax avoidance in Canada, by failing to disclose “related party” transactions (although the meaning of “related party transaction” is a complicated and highly nuanced question of Delaware corporate law), and by failing to correct after-the-fact inaccurate SEC

¹⁸ See *United States v. Sababu*, 891 F.2d 1308, 1325 (7th Cir. 1989) (“special verdicts are disfavored in criminal cases because they conflict with the basic tenet that juries must be free from judicial control and pressure in reaching their verdicts”).

disclosures. Before this case, no one could have predicted that each or any of these theories would fall within the meaning of “honest services.”

Federal courts have sought for years to articulate ways to narrow the reach of the statute, but none of the limiting principles articulated by the courts would cover the application of § 1346 to the facts of this case. In *United States v. Rybicki*, for example, the *en banc* Second Circuit articulated one possible limit, confining § 1346 prosecutions in private-sector cases to factual paradigms that had been sustained by courts prior to the Supreme Court’s decision in *McNally v. United States*, 483 U.S. 350 (1987). 354 F.3d 124, 138, 141 (2d Cir. 2003) (concluding that only some intangible rights cases are constitutional and drawing the line at pre-*McNally* cases that, if they involve self-dealing, “cause, or at least [are] capable of causing, some detriment . . . to the employer”). The facts of this case are not paradigmatic, and therefore could not be sustained in the Second Circuit, or for that matter, the Fifth Circuit. See *United States v. Brown*, 459 F.3d 509 (5th Cir. 2006). The *Brown* court found it necessary to put a stop to the ever-expanding application of the honest services statute. *Id.* at 523 (“we resist the incremental expansion of a statute that is vague and amorphous on its face and depends for its constitutionality on the clarity divined from a jumble of disparate cases. Instead, we apply the rule of lenity and opt for the narrower, reasonable interpretation that here excludes the Defendants’ conduct”). Indeed, as this Court recognized in *Thompson*, “the Rule of Lenity counsels us not to read criminal statutes for everything they can be worth.” 484 F.3d at 884.

We appreciate that this Court has consistently rebuffed previous constitutional challenges to Section 1346 (see *Hausmann*, 345 F.3d at 958; *Warner*, 498 F.3d at 697-99), but as *Warner* recently noted, vagueness challenges “must be examined in the light of the facts of the case at hand.” *Id.* at 697 (quoting *United States v. Powell*, 423 U.S. 87, 92 (1975)). In the past, the Court has stressed that prior decisions, requiring proof of a misuse of position for private gain “at the expense of the party to whom [a] fiduciary duty was owed,” provides sufficient notice to potential defendants to save the statute from unconstitutional vagueness. *Id.* at 698. Here, however, where the government proved no cognizable private gain, much less a private gain at International’s expense, only an unprecedented and unwarranted expansion of § 1346 could possibly reach defendants’ conduct.

The need for limiting principles is especially acute because this Circuit’s honest-services jurisprudence, unlike that of some other circuits, permits prosecutions under § 1346 even without any allegation that the defendant transgressed some state or federal statute. Compare *Bloom*, 149 F.3d at 654 (“One way to cope with this problem [of vagueness] would be to limit prosecutions to cases in which a defendant’s acts not only violated a fiduciary duty but also transgressed some other rule of law. . . . As a limiting principle, this has two shortcomings”), with *United States v. Brumley*, 116 F.3d 728, 734 (5th Cir. 1997) (*en banc*) (holding that the “services” owed under § 1346 are those an employee must provide to his employer under state law), and *United States v. Murphy*, 323 F.3d 102, 114 (3d Cir. 2003) (“[A] violation of state law serves as an important limiting principle on the scope of § 1346 honest services fraud.”).

This Court has recognized the ambiguity at the heart of the honest-services doctrine, and it has signaled that, in the appropriate case, it might be prepared to articulate additional limits. As it stated in *Thompson*, “[m]isuse of office’ may be almost as slippery a phrase as ‘honest services.’ . . . One of these days we may need to gloss the phrase to reduce the risk that uncertainty poses to public servants.” 484 F.3d at 883. See also *Warner*, 498 F.3d at 698-99 (rejecting as-applied vagueness challenge but noting that “the intangible rights theory of federal mail fraud may have its problems when applied to other fact settings”). Appellants accept the invitation extended in *Thompson*: we believe the honest-services statute, in the expansive form the government seeks to use it here, to be unconstitutionally vague, both facially and as applied – a vagueness brought into stark relief by a prosecution of defendants accused of nothing more than violating the duties they purportedly owed their employer under Delaware’s corporate governance rules. The fact is, § 1346 has no common law or statutory provenance that might add content or meaning to its Delphic language. The term “honest services” provides no guidance as to what conduct the statute prohibits and no standards to prevent its arbitrary and inconsistent enforcement by government. Thus, both evils of unconstitutional vagueness – lack of notice as to how to conform one’s conduct to the law and unfettered law enforcement discretion in enforcing the statute (*Kolender v. Lawson*, 461 U.S. 352, 357 (1983)) – are found in § 1346, and either one is enough to strike down the statute. At a minimum, there are sufficiently substantial constitutional concerns to require the adoption of a strictly narrowed construction that would exclude the conduct here.

II. DEFENDANTS WERE ENTITLED TO JUDGMENTS OF ACQUITTAL OR AT LEAST A NEW TRIAL ON THE SUPPLEMENTAL PAYMENTS (COUNT 7).

The “Supplemental Payments,” the subject of Count 7, involved the \$600,000 Radler testified to having distributed to the Ravelston Executives from the proceeds of newspaper sales to Forum and Paxton. The government’s theory on Count 7 was that these payments, like the APC payments, were blatant “money grab[s]” (T.855) because there were no non-compete agreements to justify them, and their receipt deprived International of both money and defendants’ honest services. The government adduced no evidence, however, that defendants knew or had reason to suspect that the Supplemental Payments were misappropriated from International. Only Radler knew where these funds came from, and there was no evidence that he told any of the recipients.

A. Defendants’ Knowledge Of Any Misappropriation Was Not Proved.

As we have explained, individual non-compete agreements had been contemplated, and approved, in connection with the Forum and Paxton sales. But through Kipnis’s oversight, these agreements were not included in the final sales contracts. To prove that defendants schemed to defraud International by accepting the Supplemental Payments, therefore, the government had to prove that defendants knew that Kipnis omitted the non-compete agreements.¹⁹ The government introduced no evidence – literally none – from which the jury could have inferred that Black,

¹⁹ Significantly, defendants were acquitted on all counts involving newspaper sales in which individual non-compete agreements and payments of the kind Kipnis was supposed to draft for the Forum/Paxton transactions had in fact been executed.

Boulton, or Atkinson possessed such knowledge, or knew that Radler had used reserve moneys to make the payments. The evidence as to each defendant's guilty knowledge and participation is less than insufficient — it is non-existent.

The district court itself appeared to recognize the weakness of the government's case on Count 7. It acquitted Kipnis despite the government's contention that his role was central. The evidence against the remaining defendants was every bit as paltry as against Kipnis. The court also found that the USSG "loss" attributable to Atkinson and Boulton on Count 7 was limited to their own \$15,000 Supplemental Payment because, even under a preponderance standard, there was no evidence that they knew or could reasonably have foreseen that any other defendant received a payment.

1. Black

The evidence bearing on Black's knowledge falls far short of satisfying the government's burden; instead, it demonstrates that Black believed these were authorized non-compete payments. Black (along with Radler and Richard Perle) had executed the Executive Committee Consents expressly approving individual non-compete agreements in the Forum and Paxton deals, consents the full Board subsequently approved. Black had absolutely no reason to believe that non-compete agreements had been omitted from the closing documents for those transactions. Consistent with that understanding, Radler testified that Black called him after those deals closed to ask "whether" the (approved) payments would be forthcoming.

Radler testified that after discovering that no funds had been designated for individual non-competes, he unilaterally decided to use the reserve money for that

purpose and later called Black to inform him that this sum “could be allocated” to non-compete payments. Perhaps a mind-reader could discern from Radler’s cryptic “could be allocated” comment that there were in fact no individual non-compete covenants in the Forum/Paxton agreements, but that is certainly not what Radler said, and not likely what he meant, since even Radler was unaware until two years later that Kipnis had failed to implement non-compete provisions for the Ravelston Executives. This cryptic conversation is far too ambiguous to support a conviction. See *United States v. Mulheren*, 938 F.2d 364 (2d Cir. 1991) (ambiguous conversation insufficient to support knowledge of stock price manipulation scheme). There was no other evidence that anyone ever told Black no non-compete agreements existed. All Black knew after the call from Radler was that there was money to be allocated among the individuals – hardly surprising, since he knew individual payments had been approved.

2. Atkinson

The only evidence linking Atkinson to the Supplemental Payments was his receipt of a \$15,000 check with an attached stub containing the words “non-compete pymt.” Receipt of the check is patently insufficient to uphold Atkinson’s conviction.

According to the Information, Atkinson’s receipt of his Supplemental Payment was unlawful because (1) he knew that the funds derived from the Forum and Paxton transactions, and yet (2) there had never been any non-compete agreement executed as part of that transaction, and therefore (3) he knew that the \$15,000 he received must have been diverted from International’s reserve account relating to the Forum and

Paxton transactions. SA73. There was no evidence, however, that Atkinson knew any of those crucial facts.

First, there was no evidence that Atkinson knew that the \$15,000 was associated with the Forum and Paxton transactions. Radler, who directed this payment, did not testify that he ever spoke with Atkinson about why he directed the payment. To the contrary, the only evidence even remotely bearing on that question consisted of a January 30, 2002, draft proxy disclosure that Atkinson received from Kipnis and Linda Loye (an International attorney and Assistant Secretary) advising him that the \$15,000 was paid “[i]n connection with the sales of United States newspaper properties in 2000.” SA615. From the government’s evidence, the only reasonable inference the jury could have drawn was that Atkinson understood the \$15,000 was a bona fide non-compete payment, derived from the 2000 sale of certain United States newspapers. Certainly there was no non-speculative evidence that Atkinson knew the money came from the Forum and Paxton deals in particular.

But even had Atkinson guessed that the \$15,000 was associated with the Forum and Paxton transactions, the evidence failed to show that he knew that no non-compete agreement had been included in the transaction documents. To the contrary, Kipnis had executed and signed a non-compete agreement on Atkinson’s behalf several months earlier in the CNHI II transaction (SA550-53) (the subject of acquitted Count 5). Atkinson would have had every reason to make the same assumption regarding the \$15,000 non-compete payment. Indeed, the evidence showed that Radler had expressly

advised Atkinson that the non-compete payments he received had been approved by International's Audit Committee. T. 3615-16, 10529-30; DX Atkinson Torys 54.

In denying Atkinson's Rule 29 motion, the district court thought it significant that Atkinson did not mention his \$15,000 payment when he spoke with Cravath lawyers about whether International should disclose the CanWest non-compete payments. But this conversation was not probative of guilt. While representing underwriters in an International debt offering, lawyers at Cravath, Swaine & Moore learned of \$80 million (Canadian) in non-compete payments made in the CanWest transaction (Black and Radler (\$19 million each), Atkinson and Boulton (\$2 million each), and Ravelston (\$38 million))²⁰ and disagreed with advice Torys had previously given International that such payments need not be disclosed in International's SEC filings. SA310-13, 315-16. Notwithstanding Cravath's view, Torys advised Atkinson and Kipnis that Cravath agreed that no disclosure was required, informing Atkinson and Kipnis that the "issue is dead." SA549. Atkinson nonetheless contacted Cravath seeking a second opinion, to make sure International was in compliance with U.S. securities laws. SA318-20, 322. Two Cravath attorneys testified that in a conversation initiated by Atkinson on May 9, 2001, they expressed the view that the CanWest payments needed to be disclosed. SA301, 333-35. According to the Cravath attorneys, Atkinson did not mention the \$15,000 check he received during this conversation. SA307-08, 337.

²⁰ The CanWest transaction was the subject of acquitted counts 8 and 9.

As one of the Cravath attorneys (Rogers) acknowledged, this was a non-privileged conversation regarding the legal obligation, if any, to make a quite different disclosure – of non-compete payments in the CanWest transaction. Cravath was representing a different client – the underwriter – with materially different interests from International. SA324-27. Atkinson therefore had a compelling reason to confine his remarks to the matter at hand, *i.e.*, disclosure of the CanWest non-compete payments.

What's more, Atkinson had previously disclosed to Beth DeMerchant, International's outside counsel at Torys, that he had received non-compete payments in the U.S. community newspaper transactions. SA289-93, 295-97. That fact makes the inference that Atkinson intended to conceal the information from Cravath particularly weak.²¹

In short, the only evidence linking Atkinson to the “money grab” charged in Count 7 was his receipt and deposit of a \$15,000 non-compete payment that he had been informed had been approved by the Audit Committee. That evidence is insufficient to prove either a money/property or honest-services deprivation.

3. Boulton

There was no evidence that Boulton was aware that his \$15,000 APMS check was associated with any non-compete agreement, let alone the Forum and Paxton

²¹ In addition, DeMerchant had the same disclosure obligation, if any, as Atkinson. If DeMerchant thought it unnecessary to volunteer to Rogers that International executives had received non-compete payments in the U.S. community newspaper transactions, nothing suspicious can possibly be drawn from Atkinson's failure to do so.

transactions. The only evidence of Boultonbee's contemporaneous conduct or knowledge was his receipt and deposit of the check, which was not accompanied by a stub revealing its purpose. That's it. Thus, the jury was left to speculate concerning Boultonbee's knowledge or belief about the check or its purpose.

Certainly Boultonbee's receipt and deposit of the check did not remotely resemble the government's far-fetched characterization to the jury, *i.e.*, that Boultonbee was like an employee of the Chicago public school system "receiving checks for tens of thousands of dollars *** from another city organization." T.15,038-39. Boultonbee's supplemental payment was not for "tens of thousands of dollars" – it was relatively modest in the context of his overall annual compensation (more than \$1 million [GX Expense 7]) – and his check did not come from the equivalent of "another city organization," but from the operating arm of APC, a subsidiary of International, of which Boultonbee was Executive Vice-President. In other words, both in its amount and provenance, Boultonbee's check was completely unremarkable.

The district court's conclusion that "[d]efendants never received any legitimate bonus payments from any subsidiary of International" (SA199) was manifestly wrong. The evidence showed that, from time to time, Boultonbee and other Ravelston executives received bonus payments from International and its subsidiaries. See, *e.g.*, SA569-70, 561-62. As a result, nothing about the fact that the Supplemental Payment came from APMS should have given Boultonbee pause, much less aroused suspicion.

The district court also thought it material that Boultonbee had not disclosed his Supplemental Payment to a Cravath lawyer (Rogers) during a brief telephone

conversation in May 2001. In the court's view, that omission showed concealment. SA201 ("During the conversations and despite Mr. Rogers' strong warnings, neither Mr. Atkinson nor Mr. Boulton disclosed the supplemental payments, even though they had received them just months before"). On the contrary, if Boulton believed that his Supplemental Payment was bonus compensation, he would have had no reason to mention the payment during the telephone conversation with Rogers.

Furthermore, Boulton never had a conversation with Rogers in which Rogers issued a "strong warning" about International's potential liability as a result of non-disclosure of the CanWest non-compete payments. Boulton participated in only one telephone conversation with Rogers, and was a passive participant at that. The conversation was principally between Rogers and DeMerchant, International's outside counsel in the CanWest transaction. Rogers testified that, during this conversation with DeMerchant, he stated his conclusion in "summary fashion" that International was required to disclose CanWest non-compete payments. SA303-05, SA329-31. Rogers also acknowledged that, during the conversation, DeMerchant "challenged" Rogers's conclusion that disclosure of the CanWest non-compete payments was required. SA304 ("I was surprised that she was challenging me on that, but she was").

Thus, not only were Rogers's statements during his single conversation with Boulton quite limited, but Boulton heard International's own trusted counsel, DeMerchant – someone with whom Boulton had worked closely in the intensive negotiations in the CanWest deal (acquitted conduct) – dispute Rogers's conclusion that the much larger individual CanWest non-compete payments had to be disclosed.

Finally, even assuming the evidence permitted an inference that Boulton knew his \$15,000 APMS check was intended to be consideration for a non-compete agreement, and permitted the additional inference that the payment was associated with the Forum and Paxton transactions, Boulton would have had no reason to know or believe that anything was amiss. There was no evidence that Boulton knew of Kipnis's failure to draft the personal non-compete agreements in the Forum and Paxton transactions, and Boulton's failure to personally sign the agreement would have meant nothing to him, since Kipnis signed Boulton's name to the non-compete agreement in the CNHI II transaction (charged in acquitted Count 5).

In short, there simply was no evidence from which to infer Boulton's contemporaneous knowledge or belief that the APMS check was associated with a non-compete agreement or was in any way culpable or even suspicious.

4. Failure to Disclose To The Audit Committee

In denying defendants' Rule 29 motions, the district court found that the evidence was sufficient to uphold defendants' conviction on Count 7 under an honest services theory based on their supposed failures to seek approval for the Supplemental Payments from International's Audit Committee. See SA198 ("Even though this was a related party transaction, Black did not seek approval from the Audit Committee or the Board of Directors for these payments."); SA199-200 (Atkinson's failure to disclose receipt of these payments to the Audit Committee constituted a breach of his fiduciary duty to International); SA200 (Boulton deprived International of its right to his honest

services by “wrongfully siphon[ing] off money belonging to International” without informing the Audit Committee).

Whether the Audit Committee actually did approve the payments was disputed at trial (the Audit Committee had in fact approved vastly larger individual non-compete payments in other transactions [*e.g.*, GX Audit 8-B]), but assuming the jury could have found the payments were not presented to the Committee for approval, this fact cannot bear the weight assigned to it. Atkinson, for example, never attended Audit Committee meetings (T.8899), and Black only attended one such meeting, in 2003, long after any of the events relevant to this charge (T.6309, 6837-38). Neither would not have known whether Radler, who did attend the meetings, had secured Audit Committee approval. As for Boulton, the record reveals that he attended only one Audit Committee meeting a year: the meeting at which KPMG went over year-end financials. Indeed, at one such meeting attended by Boulton, in February 2002, Governor Thompson confirmed to KPMG that the Audit Committee had approved the non-compete payments in the U.S. Community Newspaper transactions. T. 4944, 5126; DX Kipnis KPMG 133; DX JB Audit 16.

In any case, since the government failed to prove defendants knew they were receiving money to which they were not entitled, the government could not have proven guilt on an honest-services theory. The court simply misperceived the lack of evidence of culpable knowledge which underlay any theory of mail fraud liability on Count 7.

The court's conclusion also completely ignored the evidence that the Executive Committee consents approving individual non-compete agreements in the Forum/Paxton deals were approved by the entire Board, which included the members of the Audit Committee. GX Board 1-D. The identical process had been used to obtain approval of the CNHI II payments on which the jury acquitted. It accordingly seems highly implausible that the jury convicted on the basis of a bypassing of the Audit Committee. Indeed, to do so would have been irrational.

5. Post-Scheme Evidence

The district court's denial of post-trial relief on Count 7 also relied, erroneously, on the same alleged acts of post-scheme concealment the court discussed in relation to Counts 1 and 6. Those acts consisted of (a) Atkinson's and Boulton's responses to a 2002 proxy questionnaire, disclosing certain non-competition payments while omitting mention of the Supplemental Payments (GX Filing 7 & 8); (b) the alleged mischaracterizations in International's 2001 and 2002 10-K and proxy statements (SA563-70); and (c) Black's and Atkinson's correspondence in May 2003 (GX Shareholder 42, 51 & 55) discussing corporate governance strategy, allegedly designed to keep shareholders and the Special Committee from focusing on the non-compete payments. SA199-202.

As we have explained (*supra*, at 43), acts of concealment occurring long after the scheme has terminated have little or no relevance to the issue of a defendant's knowledge at the time of the charged conduct, and by themselves are insufficient to

prove that essential element. See, e.g., *Rose*, 12 F.3d at 1421 (“false exculpatory statements cannot be the *sole* basis for conviction”) (emphasis in original).

In any event, the evidence of post-scheme conduct on which the court relied was of the weakest and most ambiguous variety. For example, Black’s proxy questionnaire disclosed his supplemental payments (GX Filing 5 at 16), undermining any inference that Atkinson and Boulton were attempting to hide their modest \$15,000 payments by omitting them from their responses to the proxy questionnaire. The disparity in defendants’ disclosures is at odds with any notion of concerted concealment activity implicit in a scheme to defraud.

Moreover, Loye’s and Kipnis’s fax to Atkinson and Boulton in January 2002 (reflecting disclosure of their \$15,000 payments (SA606-15)) contradicts the notion that either man sought to conceal information about his payment by omitting it from his proxy questionnaire. The proxy questionnaires were to be completed by January 31, 2002. But on January 7, 2002, Atkinson and Boulton had been told that Torys had been asked to advise International “whether and to what extent the various 2000 and 2001 non-compete payments must be disclosed” (SA616), and on January 30 they received a draft proxy disclosure from Loye and Kipnis specifically describing the \$15,000 payments. Atkinson and Boulton knew that disclosure of their \$15,000 payment had captured the attention of International’s outside and in-house counsel responsible for those filings, as well as International’s outside auditors. See also SA594 (Linda Loye March 2002 email to Atkinson also listing the Supplemental Payments).

Nor do the 10-K and the proxy filings in 2002 and 2003 support the court's reasoning. Those filings, drafted by Torys lawyers and KPMG, disclosed that defendants received the Supplemental Payments under non-compete agreements and that the payments were approved by the Audit Committee, precisely as Atkinson and Black were led to believe when the payments were made. T.3615-16, 10529-30; DX Atkinson Torys 54. If defendants did not know that the approved non-compete covenants had been left out of the transaction documents, they would have no reason to believe that the description of the Supplemental Payments in the disclosures was incorrect.

To the extent that Boulton understood (by the time of International's 2002 public filings) that his \$15,000 check was intended to be consideration for a non-compete agreement, he had every reason to believe that the Supplemental Payment was innocent precisely because it was disclosed in the filings and characterized as having been approved by the Board. He reiterated this belief to the Special Committee. SA404 (Special Committee counsel Rosenberg: "I recall [Boulton] saying for the U.S. Community Newspapers in general the payments that he got that he was told that they were approved").

The e-mail communications between Black and Atkinson carry no more weight.²² Those communications, two years after the Supplemental Payments, had nothing to do with the Supplemental Payments charged in Count 7, but rather concerned the non-

²² The Black/Atkinson e-mail communications were admitted only against them; they cannot support Boulton's Count 7 conviction.

compete payments in the CanWest transaction (acquitted conduct) and the Special Committee process generally.

In sum, there is insufficient evidence of defendants' guilt on Count 7 under either of the government's fraud theories.

B. Failure To Prove The Charged Mailing

The evidence was insufficient on Count 7 for another reason: the government failed to prove the charged mailing of the Supplemental Payments from McBride in Marion, Illinois, to Kipnis in Chicago.²³ No envelope, packaging, or tracking slip was ever offered into evidence, and not a single witness testified that the checks were actually sent by overnight mail from Marion to Chicago, or received by Kipnis in Chicago, as charged.

While a mailing may be proved through circumstantial evidence, such evidence must establish more than that the mailing was just a "probability"; it must exclude any reasonable doubt to the point of "overcoming the presumption of innocence." *United States v. Brooks*, 748 F.2d 1199, 1203 (7th Cir. 1984) (reversing mail fraud conviction for failure to offer either physical evidence of the mailing or testimony of a witness with personal knowledge of the mailing); see also *United States v. Spirk*, 503 F.3d 619, 623 (7th Cir. 2007) (reversing for insufficient proof of the mailing, and stating that a "guess is not proof beyond a reasonable doubt").

²³ Count 7 charged that "[o]n or about April 9, 2001" defendants did "knowingly cause to be deposited for delivery by an interstate carrier an envelope addressed to MARK S. KIPNIS, to be sent and delivered by an interstate carrier, according to the directions thereon, which envelope contained 'non-competition payments' in the form of checks totaling \$600,000 made payable to BLACK, Radler, BOULTBEE and ATKINSON." SA84.

Here, the government relied on three pieces of weak and equivocal circumstantial evidence: (1) an April 6, 2001 memo from APC's McBride to his assistant Morse, directing her to send the checks on Monday, April 9, "via overnight delivery to Mark Kipnis" (SA572); (2) the testimony of Kipnis's secretary, Angela Way, that "generally the packages *** received from the Marion office were sent via UPS" and that she did not recall receiving material from the APC office in Marion "delivered by hand" (SA236-39); and (3) the dates of the checks (April 9) and their deposit in defendants' Canadian banks as early as April 11, 2001. T.13862, 15109-10. The circumstantial evidence was insufficient.

Despite the directions in the McBride memo to send the checks to Kipnis via overnight delivery, there was no evidence that the direction was followed. Inexplicably, the government called neither the memo's author (McBride) nor its recipient (Morse). Indeed, Radler, who, according to the memo, was to receive a copy, did not recall ever seeing it (SA396-97), and the district court acquitted Kipnis, another indicated recipient, because the evidence failed to establish that he actually received it:

There is no evidence that Mark Kipnis received the memorandum other than the fact that he was copied on the bottom of the memorandum, and David Radler testified that he did not recall receiving the memorandum even though he was copied on it. No one testified that he or she sent the memorandum to either of the individuals copied on it. The government did not introduce any evidence that Kipnis or his office maintained a copy of it.

SA204. This rationale for acquitting Kipnis, *i.e.*, the lack of evidence that the directions in the McBride memo to "cc" the document to Kipnis and Radler had been followed,

undermines any suggestion that the evidence was sufficient to find that the memo's direction to use overnight delivery to send the checks to Kipnis had also been followed. SA206.

Moreover, in light of the court's finding that Radler kept the Supplemental Payments from Kipnis (part of the court's rationale for acquitting Kipnis (SA203)), Radler would have directed that the Supplemental Payments not be sent to Kipnis, making Way's testimony largely irrelevant. The logic of the court's findings is that the Supplemental Payment checks may not have been sent to Kipnis at all, but instead directly from McBride's office in Marion to the executives in Canada, which is precisely how McBride transmitted the checks in the CNHI II transaction. SA554. The government's failure to exclude this entirely reasonable possibility is fatal. That is particularly true given other gaps in its proof – *e.g.*, its failure to ask Way at trial whether she remembered receiving and opening an envelope containing the Supplemental Payments, though she routinely opened Kipnis's mail (SA241), and the absence of any cover letter from Kipnis transmitting the checks to defendants in Canada, though Kipnis did include a cover letter when he sent other such checks to Canada, *e.g.*, the APC payments. SA533. Finally, the timing of defendants' deposits in Canada two days after the checks were drawn in Marion is consistent with the proposition that the checks got to Canada through an uncharged means.

Despite the ease with which the government should have been able to prove the charged and jurisdictionally necessary mailing in Count 7, it dropped the ball, offering inadequate circumstantial evidence that left the jury to find the mailing by guesswork.

III. IT WAS PREJUDICIAL ERROR TO GIVE THE “OSTRICH” INSTRUCTION.

Culpable knowledge was the central issue at trial on Counts 1, 6, and 7, and the government faced a formidable – indeed, insurmountable – burden in proving it. For the APC counts, there was no evidence that defendants actually knew that the Ravelston Executive payments were not approved management fees, as Radler testified. On the Supplemental Payments, there was no evidence that defendants knew that Kipnis had failed to include individual non-compete agreements in the Forum and Paxton transactions, or that they knew in any event that the payments derived from misappropriated funds.

Faced with the inadequacy of its proof of culpable knowledge, the government sought to lower the bar. Over defense objection,²⁴ the district court gave a conscious avoidance, or “ostrich,” instruction permitting conviction upon a showing that a defendant “had a strong suspicion that criminal conduct was occurring, yet intentionally shut his eyes for fear of what he would learn.” T.15187-88. On this record, the court should never have given the instruction, and the error was severely prejudicial, warranting a new trial. See *United States v. Giovannetti*, 919 F.2d 1223, 1228 (7th Cir. 1990) (reversing for unwarranted ostrich instruction), on reargument, 928 F.2d 225, 225-26 (7th Cir. 1991) (“*Giovannetti II*”) (“the giving of the ostrich instruction in this case was a legal error, so the abuse of discretion standard did *not* apply to our review of it”); cf. *United States v. Leahy*, 464 F.3d 773, 796 (7th Cir. 2006) (ostrich instruction

²⁴ R. 473 at 72-73; see also R. 727, 730, 731, 734, 872, 919; T.11,723-26, 12,371-72, 13,503-08.

assumed “additional significance given the relatively thin evidence” of actual knowledge).²⁵

A. The Legal Standard: A “Deliberate Effort To Avoid Guilty Knowledge”

Ostrich jurisprudence is particularly well developed in this Circuit.²⁶ To justify the instruction, “the government [must] present[] circumstances from which a jury could conclude that the defendant *deliberately avoided* the truth.” *United States v. Carrillo*, 435 F.3d 767, 780 (7th Cir. 2006) (emphasis added). This Court has emphasized the very narrow applicability of the ostrich instruction: it is justified only when, based on the evidence, “the only way the defendant could not have known of the illegal activity is by *affirmatively avoiding* the knowledge.” *United States v. Fauls*, 65 F.3d 592, 598-99 (7th Cir. 1995) (emphasis added). “Great caution must be exercised *** in determining which circumstances support the inference of deliberate ignorance. The most important

²⁵ Although *Giovannetti II* plainly holds that an unwarranted ostrich instruction is “legal error” reviewed *de novo* (even when “there is no quarrel with the wording of the instruction” (*Giovannetti I*, 919 F.2d at 1226)), the government argued in its bail opposition that an abuse-of-discretion standard applies. GR 35. The Court appears divided on the issue (compare *United States v. Carani*, 492 F.3d 867, 873 (7th Cir. 2007)), as are other courts of appeals. See *United States v. Heredia*, 483 F.3d 913, 921 n.11 (9th Cir. 2007) (*en banc*). While the ostrich instruction in this case was unjustified under any standard of review, we submit that the *de novo* standard articulated in *Giovannetti* is appropriate, given the legal nature of the question whether an ostrich instruction should have been given at all and the recognized dangers of the instruction.

²⁶ See, e.g., *Carani*, 492 F.3d at 873; *Leahy*, 464 F.3d at 796; *United States v. Carrillo*, 435 F.3d 767, 779-80 (7th Cir. 2006); *United States v. Jaffe*, 387 F.3d 677, 681 (7th Cir. 2004); *United States v. Fallon*, 348 F.3d 248, 253 (7th Cir. 2003); *United States v. Inglese*, 282 F.3d 528, 537 (7th Cir. 2002); *United States v. Craig*, 178 F.3d 891, 896 (7th Cir. 1999); *Fauls*, 65 F.3d at 598-99; *United States v. Rodriguez*, 929 F.2d 1224, 1228 (7th Cir. 1991); *Giovannetti I*, 919 F.2d at 1226-29; *United States v. Caliendo*, 910 F.2d 429, 433-34 (7th Cir. 1990); *United States v. Ramsey*, 785 F.2d 184, 190 (7th Cir. 1986).

principle for the district court to keep in mind is that the ostrich instruction is not meant to allow a jury to convict a person for negligence." *Carrillo*, 435 F.3d at 781.

As Judge Posner has explained, ostriches

do not just fail to follow through on their suspicions of bad things. They are not merely *careless* birds. They bury their heads in the sand so that they will not see or hear bad things. They *deliberately* avoid acquiring unpleasant knowledge.

Giovannetti I, 919 F.2d at 1228 (emphasis in original). In reversing because the ostrich instruction was given without sufficient justification, *Giovannetti* made clear that the instruction "is designed for cases in which there is evidence that the defendant, knowing or strongly suspecting that he is involved in shady dealings, *takes steps* to make sure that he does not acquire full or exact knowledge of the nature and extent of those dealings." *Id.* (emphasis added).

Of course the "steps" a defendant "takes" may be established "by overt, physical acts as well as by 'purely psychological avoidance, a cutting off of one's normal curiosity by an effort of will.'" *United States v. Craig*, 178 F.3d 891, 896 (7th Cir. 1999); see also *United States v. Fallon*, 348 F.3d 248, 253 (7th Cir. 2003). However difficult it may be to distinguish "between the cutting off of one's curiosity and a simple lack of effort," "[t]he latter cannot be punished." *Leahy*, 464 F.3d at 796. In the end, the question is whether the evidence clearly indicates that the defendant, confronted with highly suspicious circumstances, made "a *deliberate effort* to avoid guilty knowledge." *Giovannetti I*, 919 F.2d at 1228-29 (emphasis added).

B. Analysis

This Court has never upheld an ostrich instruction on as meager a factual record as this case presents. Here, unlike any of this Circuit's prior ostrich cases (see n. 26 *supra*), there simply was no evidence from which one could reasonably infer that defendants purposefully avoided acquiring guilty knowledge. For example, unlike *Craig*, where the defendant acknowledged being suspicious of fraud and bringing her suspicions to the attention of others, the government presented no evidence here demonstrating that defendants harbored contemporaneous suspicions concerning the legitimacy of the APC and Supplemental Payments. For the reasons already detailed (see Points I & II, *supra*), the circumstances gave no indication that anything illegal was happening, and fell far short of the bright red flags seen in cases in which ostrich instructions have been approved.

Moreover, far from indicating that defendants buried their heads in the sand, the government's evidence actually suggested that at least some of them inquired about the nature of the payments and sought to learn more. The evidence showed that Radler had told Atkinson that the U.S. community newspaper non-compete payments were approved. SA256-57; T. 10513; SA604. And according to counsel for the Special Committee, Boulton told the Committee that he had been informed by Atkinson that these payments had been approved by the Audit Committee. SA403-04. Indeed, when KPMG and a Shearman and Sterling lawyer, at different times, asked the Audit Committee whether these payments had been approved, Governor Thompson twice confirmed that they had. SA339, 343-46, 478-80, 482-83.

In any case, if defendants had been suspicious of their payments and inquired further about them, their inquiry would not have revealed criminality. For example, had defendants asked Radler about their APC payments, he presumably would have told them, as he told Kipnis, the grand jury, and the trial jury, that the APC payments were approved management fees. *E.g.*, SA406.

Nor do the factors on which the government relied below provide any more basis for the instruction. As relevant to the counts of conviction (and while differing somewhat for each defendant), the government relied on the following facts and inferences:

- “Prior to July 2000, none of the defendants had ever been requested to sign an individual non-compete agreement, let alone received hundreds of thousands of dollars in exchange for their non-competes.” R. 711 at 2.
- Black responded to later shareholder complaints about the non-compete payments by attempting to cut off inquiry, and Atkinson, while knowing that Black gave inaccurate information to shareholders concerning the CanWest non-compete payments, “shut his eyes to the truth about the other non-compete payments.” *Id.* at 3.
- Despite learning the view of a Cravath lawyer that the CanWest non-compete payments should have been disclosed, Atkinson, Kipnis, and Boulton did not ask the lawyer whether the U.S. community non-compete payments also should have been disclosed. *Id.* at 4.
- Black and Kipnis failed to seek Audit-Committee approval for the CNHI II, Forum, and Paxton non-compete payments, and instead obtained approval through consents of the Executive Committee (consisting of Black, Radler, and non-conspirator Perle). *Id.*

None of these circumstances provides even the thinnest pretext for an ostrich instruction. Indeed, the first in the government’s litany – that it was only in July 2000 that defendants were first requested to sign individual non-competes – is entirely

beside the point. The agreements, after all, arose from Black's proposal to the Board, in April 2000, that International sell off almost all of its newspaper properties. Not before the middle of 2000, therefore, would there have been any reason to execute a non-compete agreement. And the jury's decision to acquit on all counts involving individual non-compete payments received before 2001 dramatically confirms that the earlier non-compete payments were not so pregnant with probable criminality as to create a duty of inquiry.

Nor do subsequent events, including conversations with the Cravath lawyer, Black's statements at shareholder meetings, and misstatements in public filings, alter the analysis. The trial court itself correctly voiced doubts that they could. T.13,504 ("is an ostrich instruction appropriate [when we are] dealing with concealment after the fact as opposed to the commission of the underlying act?"). *Giovannetti I* explained that the "critical" question was whether the defendant, "*when he rented the house,*" knew the illegal use to which his co-conspirators were intending to put it, and not what he "eventually" learned. 919 F.2d at 1227 (emphasis added). Cf. *United States v. Gurary*, 860 F.2d 521, 526-27 (2d Cir. 1988) ("conscious avoidance instructions are only appropriate where *knowledge of an existing fact*, and not knowledge of the result of defendant's conduct, is in question") (emphasis added).

Here, as in *Giovannetti*, the "critical" question for purposes of the ostrich instruction was whether there were sufficiently suspicious facts when defendants received the charged payments in early 2001 to put them on notice of the need to

inquire further (and whether they avoided that knowledge). What they came to know or believe as much as a year later does not justify the instruction.

Finally, the government argued as to Black that a “reasonable person” would find it “suspicious” that the non-compete payments associated with the CNHI II, Forum, and Paxton transactions (from which the government argued the Supplemental Payments were drawn) were not presented to the Audit Committee, and proceeded instead on the basis of Executive Committee consents. R. 711 at 4. This contention falls short both on the law and the facts. To begin with, the government misstates the legal inquiry: whether a “reasonable person” would find something “suspicious” is precisely the negligence standard against which this Court and others have cautioned. *Carrillo*, 435 F.3d at 781-82. Moreover, there was nothing about the fact (if it was a fact) that the non-compete payments associated with the CNHI II, Forum, and Paxton transactions were not presented to the Audit Committee that would have triggered Black’s suspicions. Black did not attend any of the relevant Audit Committee meetings (T.6837-38), but Radler did, and he presumably decided what to present to the Committee. Consequently, Black would not even have known whether the Forum and Paxton proposals were presented to the Audit Committee.

The government’s argument fails for other reasons as well. First, the method of approval at International had no bearing on whether Black knew or had strong reason to believe that the Forum and Paxton documentation in fact omitted the approved individual non-compete provisions. Second, since Black was a member of the Executive Committee, he did not need to inquire — he knew — and therefore the issue for him

was whether what he knew was criminal or innocent, a “binary choice” between actual knowledge and complete innocence that eliminates any justification for the ostrich instruction. *Giovannetti I*, 919 F.2d at 1228.

The court’s post-trial rationale for having given the instruction is no more persuasive. As to Counts 1 and 6, the only factor to which the court referred was Black’s receipt of \$2.6 million for signing a non-compete agreement “essentially not to compete with himself[,] [e]ven though APC had only one small paper that it intended to sell and defendant knew he was not a threat of competing with APC.” In upholding the conviction on Count 7, the court pointed to (a) Radler’s testimony that he and Black had discussed allocating the \$600,000 that APC had in reserve and paying out that amount in the form of non-compete payments in the Forum and Paxton transactions, even though no non-compete agreements had actually been executed by Black (or anyone else) in those transactions; and (b) that the \$600,000 in payments were mischaracterized in SEC filings a year later. The court did not even address the propriety of the instruction for the other defendants.

As discussed above (at 41-42, *supra*), this rationale reflected a fundamental misunderstanding of the nature of the APC non-compete agreements, agreements that bound defendants after they left International and applied to all APC affiliates, thus providing real and significant benefits to International. In no sense were the APC non-compete agreements undertakings by defendants not to compete with themselves. There was nothing about the APC agreement that put defendants on inquiry notice.

In short, nothing about any defendant's actions suggests that he was either aware of a high probability that the payments were fraudulent or, being so aware, took deliberate steps to avoid learning that they were. Certainly the fact that the payments were received is insufficient to justify the instruction. The court never should have given the ostrich instruction because the evidence was insufficient to support it.

C. The Instruction Was Devastating

Faced with an obviously weak case against defendants – indeed, the jury acquitted them on all but these three fraud counts – the government emphasized conscious avoidance in its closing arguments, particularly in rebuttal when defendants could not respond, and urged the jury to convict on that basis. T.13742-43, 13830, 15037-39. Given the huge gaps in the government's case, it is impossible to have the slightest confidence that the jury did not accept this invitation.

To make matters worse, the government invited the jury to *misapply* the ostrich doctrine, arguing in summation that defendants' "ostrich-like" conduct should be judged by a "reasonable man" standard. See *Carrillo*, 435 F.3d at 781-82 ("focus of the ostrich instruction is on the particular defendant, and not a reasonable person"). In essence, the government told the jury that it should convict defendants if it found that they had been *negligent* in failing to investigate the nature of the payments they received.²⁷ The government's invitation further diluted an already deficient theory of culpable knowledge.

²⁷ In its bail opposition, the government insisted that its misleading "Chicago public schools" analogy had been invited by Boulton in his summation. GR 34-35 n. 11. To make that argument, however, the government seriously distorted Boulton's summation. Contrary to the

As the government has acknowledged (GR 35), an ostrich instruction can be prejudicial. Indeed, an unwarranted ostrich instruction “assumes additional significance” precisely when, as here, the evidence of actual knowledge is “relatively thin.” *Leahy*, 464 F.3d at 796. But the government contends that any error in giving the ostrich instruction in this case was harmless because there was “substantial evidence” of defendants’ actual knowledge. GR 35. For the reasons already advanced, this claim is untenable. Giving the jury an easier but unwarranted road to conviction based on a finding of constructive knowledge, *i.e.*, conscious avoidance, could not possibly have been harmless.

The ostrich instruction and the government’s arguments based on it were the government’s best hope for a conviction on Counts 1, 6, and 7. It is likely that this is precisely what happened. The unwarranted ostrich instruction in this unusual case requires reversal.

IV. FAILING TO GIVE A LIMITING INSTRUCTION REGARDING EVIDENCE OF ALLEGED POST-SCHEME MISREPRESENTATIONS WAS ERROR.

The court permitted the government, over repeated objection (SA268-76), to elicit extensive evidence that International purportedly filed erroneous SEC disclosures and made allegedly false statements to shareholders a year or more after the charged scheme had terminated. In summation, the government repeatedly invited the jury to base a mail fraud conviction on these post-scheme disclosures. To avoid the prospect

government’s characterization, Boulton’s counsel (Mr. Tuite) used the pronoun “you” to refer to Boulton and what he could have been expected to believe or do when he received the APC and Supplemental Payments. T. 14300-03. Counsel was not invoking an objective reasonableness standard.

that the jury would accept the government's improper invitation to misuse this evidence as the basis of conviction, defendants sought an instruction that would have informed the jury that such after-the-fact filings could not be so used. The court declined to give that instruction. On this record there was a very serious risk that the jury improperly relied on the SEC filings as the sole basis for conviction on Counts 1, 6, and 7.

The government larded this case with evidence of misstatements in SEC filings made well after the fact. For example, it questioned International's controller Creasey extensively about the language disclosing the APC and Supplemental Payments in International's 2001 10-K (filed in March 2002 and again in 2003). Creasey testified that International's shareholders were given erroneous information regarding the nature of the APC money. SA265. Creasey likewise testified that the SEC filings wrongly stated that the APC payments had been "paid" in 2000. SA266.

The government elicited similar testimony from each of the Audit Committee members regarding supposed inaccuracies in post-scheme filings. See, *e.g.*, T.6510 (Kravis; Q. "Where, if anywhere, does it say here that the APC payment was not in connection with the sales of United States newspaper properties?" A. "Nowhere."); T.6793 (Thompson; Q. "Specifically, Governor, is this statement [in the 2001 10-K] – the last sentence there true? A. "No."); T.5588 (Burt; Q. [regarding the language in the 10-K that the directors had approved the U.S. Community payments,] "Is that an accurate statement, Mr. Burt?" A. "No, it's not.")

The prosecutors even pursued the inquiry with a defense expert and a defense witness, neither of whom had any personal knowledge of International's disclosures. T.13114-15 (Funk; Q. "[B]ased on your review of KPMG workpapers, is that – is that description [of payments in the 2001 10-K] accurate?" A. "No *** I don't believe that those [\$5.5 million in APC payments] were a – to satisfy a closing condition."); T.13197 (Paci; in connection with contrary language in the 2001 10-K, the government asked whether he had been told that of the \$15 million referenced as paid in 2000, "\$5.5 million was actually paid in 2001" and "was not in connection with any sales transaction."). Indeed, the government even dedicated hours at trial to playing audio recordings of International's 2002 and 2003 shareholder meetings for purported misstatements Black made there.

And there is more. The government asked Cravath lawyers to opine extensively on legal issues concerning general corporate disclosure obligations, including about liability under § 10b-5 and damages calculation. See, e.g., T.4162 ("You mentioned '10b5.' What is that?"); SA334-35 (describing a conversation explaining that "there was no doubt under the U.S. laws that these -- that this payment or these payments *** were required to have been disclosed in the U.S. – under the U.S. law in the Hollinger public filings; and, that they had not been"); T.4723-29 (series of questions discussing disclosure obligations under the securities laws).

Having elicited this evidence, the government then improperly invited the jury to convict – again over repeated defense objections – based on this evidence. The government told the jury in a multitude of ways that *the crime was that defendants made*

false disclosures. In its Rule 29 response, the government stated that this was the case it presented to the jury: “[a]s the government argued at trial, the fraud in this case was not simply that money was paid to the executives; the fraud was that defendants lied to the shareholders about *why* they were receiving money.” R. 904 at 19 (emphasis in original). See also SA510 (the crime in the case was “not about the fact that defendants got money. It’s not that by itself. The crime in this case is that the defendants hid and lied about the true reasons why they got money”); SA517 (arguing that “[t]he crime here is the defendants’ lies to the shareholders about why over \$60 million went to Inc. and [the individuals]”); T. 3880 (arguing that “[t]his is the crime. The crime in this case is that the defendants hid and lied about the true reasons why money was paid. This is what we’re talking about”)

Having told the jury that the crime was to lie, the government then went on to itemize each purported false statement in the disclosures. For example, in focusing on the disclosure of the U.S. community newspaper payments in International’s 2001 10-K, the government told the jury:

The particular dollar amount that we're talking about here is \$15.6 million.*** And you've heard the witnesses testify about this: Nine-and-a-half million was for the CNHI II transaction; five-and-a-half for APC; and, 600,000 for Forum and Paxton.*** APC, that’s not a newspaper transaction. There are no conditions of closing. There are no Non-Compete Agreements with buyers. That’s false, too.*** Forum and Paxton, again, it’s easy. The disclosure says that these guys signed non-competes with the buyers. They didn’t. That didn’t happen here. This wasn’t part of condition of closing those transactions. So, the disclosure is completely false.

SA510-12. Then the government played clips of the 2002 and 2003 shareholder meetings in its summation. It argued: “Listen to him *** That’s a lie too *** [B]ecause [he] knew that the U.S. community buyers had not requested it, he lied about it. He lied *** [He] lied by saying things that he knew to be wrong. He lied by giving partial answers to the questions.” SA514-15.

But the government was wrong. These supposed lies to shareholders were not the gravamen of the charges nor even mentioned in the Information. Moreover, they could not legally have formed a sufficient basis for an honest services conviction, even if they had been part of the charges. The erroneous disclosures, made more than a year after the last non-compete payment and the end of the charged scheme, indisputably were neither made for the purpose of seeking “private gain” nor resulted in such gain, the predicate for transforming a fiduciary breach into an honest-services deprivation. *Thompson*, 484 F.3d at 883-84; *Bloom*, 149 F.3d at 655 (“[m]isuse of office (more broadly, misuse of position) for private gain is the line that separates run of the mill violations of state-law fiduciary duty *** from federal crimes”); R. 608. Because the disclosures were post-scheme and were not charged in the Information, and because defendants did not receive any private gain as a result of the statements or omissions in SEC filings or to shareholders, these statements could not have formed the basis for convictions on Counts 1, 6, and 7.

To prevent precisely the danger that the government was urging upon the jury — that it would convict based on these disclosures and statements and not for the charged scheme to defraud that ended a year or more earlier — defendants asked the

court to instruct the jury that, while this evidence was allowed for its relevance to intent, it was not appropriate to convict for these allegedly false post-scheme disclosures. SA271-76 (“Now, I’m not saying it’s not relevant evidence; but, what I’m saying is that this jury runs a risk of being confused, and they should be – we think they should be – told, ‘Look, the charged criminal conduct here are not the disclosures’”). Defendants proposed a series of limiting instructions, culminating with this request for the final charge:

You have heard evidence in this case regarding the disclosures of non-competition payments in Hollinger International’s quarterly and annual reports and proxy statements in 2001 and 2002. *The defendants are not charged with making false or misleading statements in these filings, and you may not conclude that a defendant is guilty of mail or wire fraud based on any alleged false statements or omissions in any of these filings.*

SA156 (emphasis added).

Defendants’ instruction would have prevented precisely the risk that the government’s evidence and arguments created. The court’s refusal to give it was highly prejudicial. There was very little evidence of any defendant’s fraudulent intent in connection with the APC payments and agreements, so it is hardly surprising that the government tried to characterize the post-scheme statements as part of the crime itself. But for precisely that reason, the failure to confine the jury’s use of these post-scheme disclosures was simply devastating. See *United States v. Pedigo*, 12 F.3d 618, 626 (7th Cir. 1993) (reversing conviction for denying defendant a fair trial where court refused to

give defendant's proposed instruction, holding that the jury instructions inadequately addressed danger of improper conviction in light of evidence adduced).

Rather than giving an instruction that even resembled the one defendants sought, the court instead gave this inapposite one:

You have heard evidence in this case regarding the disclosures of non-competition payments in Hollinger International's quarterly and annual reports and proxy statements in 2001 and 2002. The defendants in this case are not charged with securities fraud.

T.15171. This instruction fell far short of what was needed to ward off the danger against which defendants' proposal was directed. The question was not whether defendants were charged with securities fraud, but whether they could be convicted of *mail fraud* on the basis of the disclosures. The instruction hardly made that important principle clear.

As this Court has noted, a jury is likely to hear a legal limiting instruction "as so much mumbo-jumbo. The Federal Rules of Evidence speak to the bench and bar; for jurors, translation is essential." *United States v. Jones*, 455 F.3d 800, 811-12 (7th Cir. 2006) (Easterbrook, J., concurring) (criticizing trial court's limiting instruction for being "a good start but leaves the jury at sea *** . This 'limiting' instruction is so general that it does not effectively distinguish appropriate from inappropriate inferences. A good limiting instruction needs to be concrete so that the jury understands what it legitimately may do with the evidence").²⁸

²⁸ See, e.g., *Huddleston v. United States*, 485 U.S. 681, 691-92 (1988) (explaining that Federal Rule of Evidence 105, which provides for limiting instructions where evidence is admissible for one

In short, the court's failure to give the jury proper guidance concerning how to navigate the abundance of disclosure evidence the government elicited simply left it "at sea" to misuse that evidence. On this record, in light of the already scarce evidence of criminal intent, that had to be highly prejudicial to defendants, entitling defendants to a new trial on all counts.

V. THE OBSTRUCTION CONVICTION MUST BE SET ASIDE.

A. The Evidence Of Obstructive Intent Was Wholly Insufficient.

Black alone was charged with one count of obstruction of justice based on the events of May 20, 2005, when he, his driver, and his assistant moved 13 boxes of his personal files and mementoes out of his office. To convict on obstruction, the jury was required to find that Black "corruptly . . . conceal[ed] a record, document, or other object, or attempt[ed] to do so, *with the intent* to impair the object's integrity or availability for use in an official proceeding." 18 U.S.C. § 1512(c)(1) (emphasis added). The obstruction conviction must be reversed because the government utterly failed to prove the required and central element of intent to conceal.

purpose but not admissible for another, "provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted"); *United States v. Foster*, 939 F.2d 445, 456-57 (7th Cir. 1991) (following *Huddleston* and providing that, if requested, a limiting instruction for similar acts evidence must be given "that the evidence is to be considered only for the proper purpose for which it is admitted"); *United States v. Cunningham*, 462 F.3d 708, 713 (7th Cir. 2006) (error in failing to give limiting instruction, when "the government piled on needless, unfairly prejudicial evidence that may have affected the jury's judgment, *** was not harmless"); *United States v. Simpson*, 479 F.3d 492, 500, 504-05 (7th Cir. 2007) (reversing conviction where district court improperly admitted prior bad act evidence and failed to issue a necessary instruction "limiting how [the jury] could or should use the statements" at issue, which error was compounded by the government inviting the jury to make an improper inference from the evidence).

The government's theory at trial was that Black moved the boxes because he wanted to shield their contents from the upcoming SEC document request. See, e.g., T.14997-98. Thus, the government zeroed in on the SEC attorney's communication with Black's lawyers the previous day.²⁹ The uncontradicted and unequivocal evidence, however, was that Black was not informed of this call until days after the boxes' removal. SA424-25, 427-28. Consequently, there was no foundation for the government's principal trial theme.

Black has never disputed that he and his driver carried boxes containing the contents of Black's office from the stairwell at 10 Toronto out to Black's car. Indeed, Black was perfectly aware that security cameras were running and that security guards were watching while they did so – indeed, he pointed to the camera so there could be no later question on the matter. SA417, 456. But the mere act itself of moving the boxes hardly establishes the offense, the gravamen of which is obstructive intent. The government's case is untenable because it failed to prove beyond a reasonable doubt – or, indeed, with any plausibility – that Black acted with a corrupt motive and specifically intended to deprive the government of relevant documents. Without such proof of intent, the government's case simply collapses, and it is left with a man lugging personal possessions out of his own office a few days before his eviction.

As this Court only recently recognized, to be convicted of obstruction under Section 1512(c)(1), a defendant “must believe that his acts *will be likely to affect* a pending

²⁹ The government has consistently mischaracterized that communication as a “request for documents,” see, e.g., GR 16, when in fact it was no such thing. The actual document request arrived three days after the boxes were moved.

or foreseeable proceeding.” *United States v. Matthews*, 505 F.3d 698, 708 (7th Cir. 2007) (emphasis added). Thus, at the risk of belaboring the obvious, an obstruction conviction requires more than some act, and it requires more than mere knowledge that an official proceeding is pending or may occur. Critically, it requires a specific *mens rea*: to be impelled by a “corrupt[.]” motive, Section 1512(c), the act must be directly tied in the defendant’s mind to a concealment of material evidence that he specifically intends and believes is likely to result from his actions.

In *Matthews*, this Court explained that this *mens rea* requirement is necessary to assure that a defendant will not be convicted unless the government has established a clear “nexus” – that is, “a relationship in time, causation, or logic” – between an official proceeding and the allegedly obstructive act. 505 F.3d at 708. The nexus requirement means that the defendant’s “endeavor must have the natural and probable effect of interfering with the due administration of justice.” *United States v. Aguilar*, 515 U.S. 593, 599 (1995) (internal quotation marks omitted). See also *Arthur Andersen LLP v. United States*, 544 U.S. 696, 708 (2005). A person who “lack[s] knowledge that his actions are likely to affect a pending proceeding necessarily lacks the requisite intent to obstruct.” *Aguilar*, 515 U.S. at 593 (emphases added).

In this case, the jury heard extensive and undisputed testimony that demolished any plausible hypothesis that Black intended to conceal something from any official proceeding or that he could have believed his actions would do so.

First, Black could not plausibly have believed that simply moving the 13 boxes from his office to his home would conceal anything from any proceeding. Although he

obviously knew the SEC was investigating him along with Radler and Inc., he also had fully complied with every previous SEC subpoena – as the government itself has stipulated. SA150-51. He knew that all the documents in his office, safes, and vaults had been thoroughly combed numerous times by lawyers – a process with which he had in no way interfered. SA485-96. Moreover, he knew that Inc. had provided documents to the SEC pursuant to a request less than two months earlier.

Against this background, it would be absurd to conclude that Black believed that anything of any possible relevance in his files had not already been copied by his own attorneys, produced to the SEC by Inc., or both. Indeed, there was never any showing that the boxes contained even a single relevant document that had not already been produced to the SEC. Nor could the mere transfer of boxes from Black's office to his residence, without more, constitute useful evidence of intent to conceal, given that Black had also given attorneys free rein to identify and copy documents at his homes. SA495-96.

In denying continued release pending appeal, the district court noted that the “removed documents included some of the non-competition agreements at issue in this case and the SEC's investigation.” SA228. But that fact was meaningless. The documents at issue in this case had been copied by lawyers long before the boxes were moved, and had already been produced to the SEC. Indeed, every potentially relevant document about which the government inquired at trial had in fact been turned over before May 20, 2005. T.11346-53. Moreover, as revealed at trial, the copy of the APC non-compete agreement found in the boxes carried a Post-It note stating that it was to

be given to Joan Maida “for Conrad’s personal file,” T.11572 – showing that it was a copy, not an original that Black could have concealed by removing it from his office.

The intent requirement, as explained by *Aguilar* and *Matthews*, means that Black had to actually believe that his act was likely to affect a pending or foreseeable proceeding – in this case, by depriving that proceeding of some relevant document. The government never explained how Black could plausibly have held such a belief, given that his files had already been thoroughly vetted by legions of lawyers and that his co-defendant Inc. had already produced documents in the same proceeding. Under the nexus test, there was no relationship in causation or logic between the SEC investigation and Black’s actions on May 20, 2005.

Second, as noted above, Black’s lawyers testified without contradiction that they did not inform him on May 19 or May 20 that another SEC document request would be coming. Thus, there was also no nexus in *time* between the SEC investigation and Black’s actions. Unable to produce any evidence that Black knew about the upcoming request – much less that the request was likely to involve anything Black’s attorneys had not already seen and copied or that Inc. had not already produced – the government was reduced to goading the jury into rank and improper speculation. The timing of the call from the SEC to Black’s lawyer in Washington and the removal of personal effects the next day was, it asserted, “quite a coincidence” (T.14997); and, in another foray into rank speculation, it argued that one could not be sure that Black had not removed something incriminating from the boxes before returning them to his office (T.15001).

Even recognizing that obstruction cases often rely on circumstantial evidence, a “coincidence” can be just that – a coincidence. Without more, it does not establish a relationship in time, causation, or logic, and it is not evidence that a defendant *intended* to obstruct justice. And here there was not more but less, given the uncontradicted evidence that Black, who does not possess powers of clairvoyance, had not been told of the SEC call. The government’s resort to coincidence, rather than proof, invited the jury to convict based on speculation – something this Court has repeatedly held impermissible. See, e.g., *United States v. Peterson*, 236 F.3d 848, 855 (7th Cir. 2001) (“To render a guilty verdict, the jury must hear sufficient evidence to avoid resorting to excessively strained inferences or guesswork.”); *United States v. Groves*, 470 F.3d 311, 324 (7th Cir. 2006) (“[S]peculation cannot be the basis for proof beyond a reasonable doubt.”).

Third, there was abundant evidence of an entirely plausible and innocent explanation for Black’s actions: that he simply wanted his personal files and possessions out before his impending eviction, and was irked that his assistant had been stopped from removing them. Black had not packed the boxes. He had given his assistant no orders about what to put in them, and he did not look into the boxes or inquire about their contents. Nor did he surreptitiously slip a packet of papers into his coat pocket. Rather, he moved 13 boxes all at once, with the help of his driver and with his assistant looking on. It was broad daylight, employees (including, apparently, the inspectors) were still in the building, and Black pointedly made clear he knew that security cameras were running and security guards were watching.

These actions might have been impetuous or even high-handed, a product of anger and frustration Black may have felt at being ejected from the building where he, his father, and his brother had maintained offices for 27 years. But they manifestly were not the actions of a man trying to spirit away some smoking gun.

In its post-trial filings, the government has consistently sought to elide the intent requirement under Section 1512(c)(1). Its arguments have proceeded as though all it was required to establish was that (1) Black removed documents from his own office, and (2) proceedings were pending of which Black was aware. For example, in its district court opposition to continued release pending appeal, the government argued that Black was aware the SEC had been investigating him “since late 2003” (R. 1027 at 24), and that it was “conventional wisdom at 10 Toronto Street” that he was also being investigated for possible violations of federal criminal law (*id.* at 23-24). But it is clear from *Aguilar* and *Matthews* that such knowledge alone cannot substitute for actual obstructive intent. Moreover, knowledge up to a year and a half old does not establish a nexus in time between a proceeding and an act supposedly undertaken to conceal documents from that proceeding.

In its bail opposition to this Court, the government argued a syllogism: because evidence established that Black “knew” of official proceedings against him, the government did not “fail[] to prove his conduct was likely to affect” one of those proceedings. GR 39. There are two problems with this move. First, whether a defendant merely knows about a proceeding sheds no light on whether an allegedly obstructive act is in fact likely to *affect* that proceeding. Second, the government’s

syllogism just slides past the requirement of *mens rea*; as this Court made clear in *Matthews*, evidence must establish beyond a reasonable doubt that the defendant acted with the *belief* that his conduct was likely to affect a proceeding. 505 F.3d at 708. Only such a belief can establish the requisite corrupt motive.

As discussed above, the abundant evidence introduced by Black at trial or stipulated to by the government — his complete cooperation with the SEC, the thorough scouring of his files, the documents produced by his co-defendant, the complete lack of any stealth in his actions on May 20 — rendered utterly implausible the notion that he intended to obstruct justice or could have believed his actions would do so.

Black's argument in this appeal does not invite the Court to simply reweigh trial evidence. As this Court has explained, when a jury's decision involves choosing between two competing hypotheses of what a body of evidence actually means, "[i]f the prosecution's theory and the alternative theory [are] equiprobable or close to it, [the defendant] would have to be acquitted." *United States v. Morales*, 902 F.2d 604, 608 (7th Cir. 1990); see also *Harris*, 942 F.2d at 1130 (reversing conviction where evidence was "as consistent with an inference of innocence as one of guilt").

In this case, "equiprobable" would be a charitable characterization of the government's evidence, since there was an alternative explanation for Black's actions that was far more plausible than the government's theory: That Black, who was in Toronto only sporadically, wanted to get his personal belongings out of the office before an impending eviction; that he took charge only after his assistant had been blocked

from doing so; that he had shown no prior disposition to limit or interfere with full production of documents in his possession; and that he had no reason to suppose that the boxes contained anything of significance that had not already been vetted, copied, and produced to the SEC. The jury had no basis to conclude beyond a reasonable doubt that the defense explanation, which was supported by evidence, was untrue or less likely to be true than the government's theory, which was based entirely on speculation.

In summary, the government failed to introduce evidence on which a rational trier of fact could have found that Black acted out of corrupt motive: that when he moved the boxes, he intended to interfere with an official proceeding, and held the belief his actions were likely to do so. The circumstances surrounding the act belie any such conclusion. Given his previous unstinting compliance with the SEC, the fact he knew Inc. had produced documents in the same proceeding, the unrefuted evidence that he did not know about the upcoming SEC request, and the fact the government never even attempted to tie the moving of the boxes to any other investigation, a jury could not have found that Black's actions had the "natural and probable effect" of obstructing any relevant U.S. proceeding.

B. The Government Was Permitted To Make Improper, Prejudicial Use Of The Canadian Court Order.

The government itself apparently realized that the obstruction count was extremely weak. For that reason, it sought to shift the jury's focus instead to Black's alleged violation of a Canadian court order about document retention at 10 Toronto. The order became the centerpiece of the government's melodramatic storyline:

according to the government, Black was caught *in flagrante delicto* in the prohibited act of removing possessions from his own office. See, e.g., T.882 (“Ladies and gentlemen, now he’s got the boxes. It’s Friday, May 20th. There was a Canadian judge order that no one remove any documents.”); T.14998 (“Why else . . . would a guy with a chauffeur, a personal assistant, teams of lawyers and hundreds of employees be lugging boxes out the back door of 10 Toronto Street in violation of an explicit Canadian court order?”). By allowing the government, over a defense objection (T.13870-71), blatantly to misuse this at best marginally relevant piece of evidence, the district court violated Black’s right to a fair trial.

The fact that the Canadian order had nothing whatsoever to do with any U.S. official proceeding, and thus could not have formed the basis for an obstruction conviction under Section 1512(c)(1), did not stop the government from making repeated and inflammatory use of it. Essentially, the government urged the jury to reason: “Black was forbidden to remove any files, and he was caught removing them anyway. He must be guilty.”³⁰ Such a strategy was especially cynical in light of the careful and nuanced decision the jury actually was *required* to make: whether Black had a specific intent to obstruct justice because he intended and expected his actions to interfere with a relevant U.S. proceeding.

³⁰ Indeed, it seems entirely likely that the jury did just that. In an interview with the *Toronto Star* shortly after the verdict, juror Monica Prince said the jury decided quickly on the obstruction charge: “Oh, guilty! They had him on tape taking those files out and they told him not to take those files out. And he took them, like: ‘I’m Conrad Black, I’ll take what I want.’” Robyn Doolittle, *Blacks' lavish lifestyle not a factor, juror says*, TORONTO STAR, July 15, 2007, available at <http://www.thestar.com/News/article/236080>.

However sensational the government's presentation of Black on videotape may have seemed to the jury, no proceeding has ever determined whether, based on the contents of the boxes, Black actually violated the Canadian order or the provisional document retention policy that was being developed at 10 Toronto to effectuate the order. It was not this jury's job to make such a determination, but that did not stop the government from encouraging it to do so. T.14999 ("He knows about the order, and he takes the boxes, and you can decide for yourself because you'll have a copy of the order."). Notably absent was a request for the jury to decide if Black committed the crime with which he actually was charged.

In effect, the government was allowed to air inflammatory charges of a separate crime without the burden of actually having to establish that crime, repeatedly referring to "obvious violation of a Canadian court order" (T.14998) and "the room where the crime was occurring" (T. 13875). The government knew the Canadian order could not serve as the basis for a U.S. obstruction conviction, but these histrionics were a transparent strategy to stoke jury prejudice and confusion and prod it into convicting on an improper basis. See *United States v. Hicks*, 368 F.3d 801, 807 (7th Cir. 2004) (finding unfair prejudice when the evidence "will induce the jury to decide the case on an improper basis, commonly an emotional one, rather than on the evidence presented") (internal quotation marks omitted). Although the district court gave a limiting instruction on the Canadian court order (T.10800), the instruction did not prevent the government's misuse of the evidence or the pernicious effect of that misuse.

In short, the government's obstruction case boiled down to a Canadian court order and a lot of speculation. The Canadian order was a fig leaf to divert attention from the lack of any serious evidence on the critical element the government was required to prove under § 1512(c)(1): that Black intended to obstruct a relevant U.S. proceeding and acted out of the belief that his actions would do so. In any context, the government's misuse would be grounds for a new trial. In this case, the Court should see it as further reason to find there was no sufficient evidence to convict on the U.S. offenses with which Black actually was charged.³¹

* * * * *

The sentences in this case were interlinked in such a fashion that a reversal on any count or counts would require resentencing on the remaining count(s). For example, if the APC count is reversed, that would change the loss calculation dramatically for all defendants and might also alter some of the enhancements applied by the district court in calculating the guideline recommendation, including Black's obstruction conviction. And if Black's obstruction conviction is reversed, it would alter the guidelines calculation for the fraud offenses. Therefore, in the event of a partial affirmance and partial reversal, defendants request that the case be remanded for resentencing.

³¹ If this Court finds that the district court erred in providing the ostrich instruction, see Part III, *supra*, it must also reverse the obstruction conviction on that basis even if it finds the evidence sufficient. A defendant cannot be convicted of obstruction for simple negligence. Yet in this case, the ostrich instruction would have allowed the jury to convict on the basis of an improperly diluted *mens rea* standard. See R.734.

CONCLUSION

For the above-stated reasons, this Court should reverse defendants' convictions and enter judgments of acquittal or order a new trial. Alternatively, the case should be remanded for resentencing and for modification of the forfeiture order.

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CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 31(e)

The undersigned attorney hereby certifies that, pursuant to Circuit Rule 31(e), I have filed electronically on a virus-free disk, versions of the brief and all of the Circuit Rule 30(a) and 30(b) appendix items that are available in non-scanned PDF format.

Dated: March 13, 2008

Stephen Sanders

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 30(d)

The undersigned attorney hereby certifies that all materials required by Circuit Rule 30(a) & (b) are included in the appendices.

Dated: March 13, 2008

Stephen Sanders

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned counsel certifies that the foregoing brief contains 27,150 words and complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i), as modified by this Court's order of February 26, 2008, allowing a consolidated brief of no more than 28,000 words.

Dated: March 13, 2008

Stephen Sanders

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that he caused two copies of the foregoing brief with the required short appendix, and one copy of the separate appendix, along with a digital version of the brief, to be served on the following counsel by hand on this 13th day of March 2008:

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